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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 196³

No. ~~31~~ 6

WILLIAM L. GRIFFIN, ET AL., PETITIONERS,

vs.

MARYLAND.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS
OF THE STATE OF MARYLAND

PETITION FOR CERTIORARI FILED AUGUST 4, 1961
CERTIORARI GRANTED JUNE 25, 1963

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

No. 26

WILLIAM L. GRIFFIN, ET AL., PETITIONERS,
vs.
MARYLAND.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS
OF THE STATE OF MARYLAND

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[fol. A]

[File endorsement omitted]

APPLICATION FOR WARRANT BY POLICE OFFICER—

Filed August 4, 1960

State of Maryland, Montgomery County:

Francis J. Collins, being first duly sworn, on oath doth depose and say: That he is a member of the Montgomery *deputy sheriff*

~~County Police~~ Department and as such, on the 30th day of June, 1960, at about the hour of 8:45 P.M. he did observe the defendant William L. Griffin in Glen Echo Park which is private property on order of Kebar Inc. owners of Glen Echo Park the def. was asked to leave the park and after giving him reasonable time to comply the def. refused to leave he was placed under arrest for trespassing

your affiant further makes oath that he has personal knowledge of additional facts and evidence which are not incorporated in this affidavit, but which have been discussed before and given to the Justice of the Peace before whom the request for issuance of a warrant was made.

Whereas, Francis J. Collins doth further depose and say that he, as a member of the Montgomery County Police Department believes that is violating Sec. 577 Article 27 of the Annotated Code of Maryland.

Francis J. Collins

Subscribed and sworn to before me, in Montgomery County, State of Maryland, this day of Jun 30 1960.

Edward W. Cashman, Justice of the Peace for
Montgomery County, Maryland.

B

[fol. B]

No. 3881 Crim.

[fol. C]

[File endorsement omitted]

STATE WARRANT—Filed August 4, 1960

State of Maryland, Montgomery County, to wit:

To James S McAuliffe, Supt. of Police of said County,
Greeting:

Whereas, Complaint hath been made upon the information and oath of Lt Collins Deputy Sheriff in and for Glen Echo Park (KEBAR), who charges William L Griffin late of the County and State on the 30th of June 1960 at the County and State aforesaid did unlawfully violate Article 27 section 577 of the Annotated Code of Maryland, 1957 edition to wit: Did enter upon and pass over the land and premises of Glen Echo Park (KEBAR) after having been told by the Deputy Sheriff for Glen Echo Park, to leave the Property, and after giving him a reasonable time to comply, he did not leave contrary to the form of the Act of the General Assembly of Maryland, in such case made and provided, and against the peace, government and dignity of the State.

You are hereby commanded immediately to apprehend the said William L Griffin and bring him before The Judge of the Peoples Court at Bethesda Montgomery County, to be dealt with according to law. Hereof fail not, and have you there this Warrant:

Edward W. Cashman, Justice of the Peace for
Montgomery County, Maryland.

Issued June 30 1960

[fol. D]

No. 3881 Crim.

Cépi Joseph Snow, Jr.

Date 6/30/60

[fol. E]

AMENDED STATE WARRANT—Filed September 12, 1960

State of Maryland, Montgomery County, to wit:

To James S. McAuliffe, Superintendent of Police of said County, Greeting:

Whereas, Complaint hath been made upon the information and oath of Lt. Francis Collins, Deputy Sheriff in and for the Glen Echo Park, who charges that William L. Griffin, late of the said County and State, on the 30th day of June, 1960, at the County and State aforesaid, did unlawfully and wantonly enter upon and cross over the land of Rekab, Inc., a Maryland corporation, in Montgomery County, Maryland, such land at that time having been leased to Kebar, Inc., a Maryland corporation, and operated as the Glen Echo Amusement Park, after having been duly notified by an Agent of Kebar, Inc., not to do so in violation of Article 27, Section 577 of the Annotated Code of Maryland, 1957 Edition as amended, contrary to the form of the Act of the General Assembly of Maryland, in such case made and provided, and against the peace, government and dignity of the State.

You are hereby commanded immediately to apprehend the said and bring before Judge at Montgomery County, to be dealt with according to law. Hereof fail not, and have you there this Warrant.

....., Justice of the Peace for
Montgomery County, Maryland.

Filed 9-12-1960

[fol. F]

3881

D

[fol. G]

[File endorsement omitted]

No. 18112

IN THE PEOPLE'S COURT OF MONTGOMERY COUNTY, MARYLAND
AT BETHESDA

Warrant issued June 30, 1960

By Edward W. Cashman, Justice of the Peace.

To James S. McAuliffe, Supt. of Police.

STATE OF MARYLAND,

VS.

WILLIAM L. GRIFFIN, Defendant.

Upon the information of Lt. Collins, Deputy Sheriff in and for Glen Echo Park, who charges that William L. Griffin on the said 30th day of June, 1960, did unlawfully enter upon and pass over the land and premises of Glen Echo Park, after having been told by the Deputy Sheriff for Glen Echo Park, to leave the property and after giving him a reasonable time to comply, he did not leave contrary to the form of the Act of the General Assembly of Maryland and against the peace, government and dignity of the State.

Return

Commitment for a hearing or trial before the Judge at Bethesda on the 26 day of July, A. D., 1960, with Bond posted as sureties.

Continued to 7/26/60

Trial on the 26th day of July A. D., 1960

Defendant asked the right of trial by Jury. Bond \$100.00 Set for Sept. 12, 1960

Original papers, bond and Docket Entries sent to Circuit Court 8/1/60

Copy of Docket Entries sent to State's Atty.

Deft's Atty: Sharlitt

Samuel Gordon, Judge, People's Court of Montgomery County, Maryland.

E

I hereby certify that the foregoing is a true copy of the Docket Entries in the above entitled case.

Given under my hand and seal this 1st day of August, A. D., 1960.

Louise S. Harding, Clerk, People's Court. Bethesda.

[fol. H]

No. 3881 Crim.

STATE OF MARYLAND,

vs.

WILLIAM L. GRIFFIN.

[fol. I]

IN THE CIRCUIT COURT FOR MONTGOMERY COUNTY, MARYLAND

DOCKET ENTRIES

No. 3881 Criminal

STATE OF MARYLAND,

vs.

WILLIAM L. GRIFFIN.

Trespassing

Aug. 4, 1960—Warrant, Recognizance, Demand for Jury Trial &c. filed. Page No. 1

Sep. 12, 1960—Motion and leave to amend warrant and amendment filed. Page No. 5

Sep. 12, 1960—Motion and leave to consolidate this case with Numbers 3882, 3883, 3889 and 3892 Criminals.

Sep. 12, 1960—Plea not guilty.

F

Sep. 12, 1960—Submitted to the Court and trial before Judge Pugh, Mrs. Slack reporting.

Sep. 12, 1960—The Court find defendant guilty.

Sep. 12, 1960—Defendant was asked if he had anything to say before sentence.

Sep. 12, 1960—Judgment that the Traverser, William L. Griffin, pay a fine of Fifty and no/100 dollars (\$50.00) current money and costs, and in default in the payment of said fine and costs, that the Traverser, William L. Griffin be confined in the Montgomery County Jail until the fine and costs have been paid or until released by due process of law.

Sep. 12, 1960—Appeal filed.

Page No. 6

Oct. 13, 1960—Petition and Order of Court extending time for transmittal of record to Court of Appeals to and including November 15, 1960 filed.

Page No. 7

Nov. 15, 1960—Testimony filed.

Page No. 9

L. T. Kardy—State's Attorney

J. H. Sharlitt & C. T. Duncan—Attorneys for Defendant

[fol. 1]

[File endorsement omitted]

**IN THE CIRCUIT COURT FOR
MONTGOMERY COUNTY, MARYLAND**

STATE OF MARYLAND, Plaintiff,

vs.

WILLIAM L. GRIFFIN,	No. 3881 Criminals
MICHAEL A. PROCTOR,	No. 3882 Criminals
CECIL T. WASHINGTON, JR.,	No. 3883 Criminals
MARVOUS SAUNDERS and	No. 3889 Criminals
GWENDOLYN T. GREENE,	No. 3892 Criminals
Defendants.	

Transcript of Hearing—September 12, 1960

APPEARANCES:

Charles T. Duncan, Esq., Joseph Sharlitt, Esq., At-
torneys for the Defendants.

James S. McAuliffe, Jr., Assistant State's Attorney,
Attorney for the Plaintiff.

[fol. 2]

COLLOQUY

The above-entitled cause came on regularly for hearing, pursuant to notice, on September 12, 1960, at 10:00 o'clock a.m. before The Honorable James H. Pugh, Judge of said Court, when and where the following counsel were present on behalf of the respective parties, and the following proceedings were had and the following testimony was adduced.

Mr. McAuliffe: Your Honor, the State will move to amend the warrants in all five cases, and I have prepared copies of the amendment that we would ask that the Court make to these warrants, and I would ask that in each case the copy which I have prepared be attached to the original warrant, as an amendment to it, and the amendment we desire to make is the same amendment in each case and would read as follows:

Judge Pugh: Have the defense lawyers seen it?

Mr. Duncan: I would like to see it, your Honor. (Mr. McAuliffe hands a copy of the proposed amendment to defense attorneys.) Defense counsel makes no objection to the motion for leave to amend the warrants, your Honor.

Judge Pugh: The motion is granted. Do you desire to make an opening statement?

Mr. McAuliffe: Yes, your Honor.

[fol. 3] Judge Pugh: The pleas are "not guilty?"

Mr. Duncan: Yes, your Honor.

OPENING STATEMENT BY MR. McAULIFFE

In the Court please, the defendants in this case are William L. Griffin, Michael A. Proctor, Cecil T. Washington, Jr., Marvons Saunders and Gwendolyn T. Greene. The State will show that on the date of June 30th of this year the five named defendants, in the company of others, came to the Glen Echo Amusement Park, located here in Montgomery County, Maryland. That upon arriving at the park a representative of the defendants conferred with Lieutenant Collins, who is the man in charge of the park's special police force there, and after that conferral that the five defendants, in the company of others, having brought with them certain signs primarily aimed at the policy of Glen Echo to segregate, and to exclude colored persons, proceeded to set up a picket line and proceeded to walk this picket line with these signs. These signs proclaimed the policy of the park and objected to it and asked, in effect, that persons who were using the park facilities—that they not use the park facilities, unless the park would see fit to integrate. A short time after this picket line had been formed, in which the five defendants in this [fol. 4] case participated—after they had all been informed, through their representative, that the park did have a policy of not admitting colored persons, the five defendants went on to the park property and went to the carousel, which is located approximately in the heart of the Glen Echo Amusement Park, and proceeded to get on the amusement rides, some of them having obtained tickets from

white persons, who had purchased them from ticket sellers within the park.

Thereafter Lieutenant Collins approached the scene where the five defendants were on the carousel, and spoke to each of the defendants and again informed them that it was the park policy not to admit colored persons to the private property owned by the park and operated by the park, and that if they did not leave that he would arrest them for trespass. He then proceeded to give them approximately five minutes, in which time they were asked to leave. At the end of that time he announced to each of the defendants—they all remaining where they had been on the carousel and in the vicinity of the carousel, in the heart of this private property, Glen Echo Amusement Park—he then proceeded to place the defendants under arrest for trespass, under Article 27, Section 577 of the Maryland Code. The defendants after being placed under arrest by Lieutenant Collins, who is a special deputy and sworn in as a Deputy Sheriff of Montgomery County, were brought to the Bethesda station.

[fol. 5] Now, we will show you further that the Glen Echo property and the Glen Echo park, upon which these defendants went, is private property. That it is owned by a corporation, Rekab, Inc. That it is leased by that corporation to another corporation, Kebar, Inc., which operates Glen Echo Park, and we will show you that Lieutenant Collins, as a member of the detective agency, is the employee and agent of both Rekab, Inc., and Kebar, Inc., and especially in this case the warrant alleges, and we will show, that he is the agent of Kebar, Inc. That he had received full authority from the President and the General Manager of the corporation with respect to enforcing the policy of the park, with respect to segregation, and that he had the full authority to maintain order there and to order off any persons which he, in his discretion and judgment, thought should not be present on the park property, and upon this showing and upon the further showing that Rekab, Inc., and Kebar, Inc., are Maryland corporations, licensed and doing business here in the State of Maryland, and upon showing you that this property upon which the defendants entered, and upon being requested to leave,

refused to leave, is in fact private property, owned by Rekab, Inc., and leased to Kebar, Inc., and upon that statement of facts, upon showing that to the Court, we will ask that the Court find these defendants guilty as charged.

[fol. 6]

MOTION TO DISMISS THE WARRANTS AND OVERRULING THEREOF

Mr. Duncan: I would like, with the Court's leave, to reserve the opening statement on behalf of the defendants, and I would like to move to dismiss and quash the warrants. The prosecutor has stated that the arrests in this case were made by a State officer for the purpose of enforcing a policy of private segregation, put into effect and maintained by the owner and lessee of the premises involved. I submit to the Court that such use of State power is unconstitutional. That the application of the statute in this case is unconstitutional. The argument being that the State may not discriminate against citizens on the ground of race and color. It may not do so directly, and it cannot do so indirectly. I further move to dismiss the warrants—

Judge Pugh: The Court is not allowed to direct a verdict on opening statements. If the Court sits without a jury, it is sitting as a jury, and then the Court is the Judge of the law and the facts, so, on opening statements we do not recognize motions for a directed verdict. The motion is over-ruled.

Whereupon, FRANCIS J. COLLINS, a witness of lawful age, called for examination by counsel for the plaintiff, and having first been duly sworn, according to law, was examined and testified as follows, upon

[fol. 7] Direct examination

By Mr. McAuliffe:

Q. Lieutenant, will you identify yourself to the Court?

A. Francis J. Collins; 1207 E. Capitol Street, Washington, D. C.

Q. Lieutenant, by whom are you employed, and in what capacity?

A. I am employed by the National Detective Agency and we are under contract to Kebar, Inc., and Bekab, Inc.

Mr. Duncan: I object to that answer, and move to have it stricken.

Judge Pugh: On what ground?

Mr. Duncan: That this witness is not competent to testify as to the contents of the contract. The contract itself is the best evidence.

Judge Pugh: Objection sustained.

Q. By whom are you employed, Lieutenant Collins?

A. National Detective Agency.

Q. And where are you stationed, pursuant to your employment with the National Detective Agency?

A. My present assignment is Glen Echo Amusement Park.

Q. And at Glen Echo Amusement Park from whom do [fol. 8] you receive your instructions?

A. From the Park Manager, Mr. Woronoff.

Q. And for how long have you been so assigned at the Glen Echo Amusement Park?

A. Since April 2nd, 1960.

Q. What is your connection and capacity with respect to the park special police force there?

A. I am the head of the special police force at the park.

Q. What instructions have you received from Mr. Woronoff, the Park Manager, with respect to the operation of the park and your duties in connection therewith?

Mr. Duncan: Objection. The authority of an agent cannot be established by the testimony of the witness.

Judge Pugh: Objection sustained.

Q. Now then, Lieutenant, directing your attention to the date June 30, 1960, did you have occasion to be at the Glen Echo Park at that time?

A. I was on duty on that date.

Q. And the Glen Echo Amusement Park is located in what County and State?

A. Montgomery County, Maryland.

Q. Directing your attention again to June 30, 1960, at [fol. 9] a time when you were on duty at Glen Echo Amuse-

ment Park, did you have occasion to see the five defendants in this case on that date?

A. I did.

Q. Will you relate to the Court the circumstances under which you first observed these five defendants at the Glen Echo Amusement Park?

Mr. Duncan: I object to that question, on the ground that it is irrelevant, until the agency of this witness has been established.

Judge Pugh: Do you proffer to show that?

Mr. McAuliffe: We proffer to show agency.

Judge Pugh: On the proffer the objection is over-ruled.

A. I did observe the defendant in the picket line, carrying signs.

Q. When was this picket line first established, Lieutenant, and under what circumstances?

Mr. Duncan: I object to that question, on the ground that it is not relevant, in my opinion. What went on outside the park has nothing to do with the issues involved here.

[fol. 10] Judge Pugh: Was this picket line on the property of the Glen Echo Amusement Park?

A. No, sir, it was on the right of way.

Judge Pugh: It wasn't on private property?

A. No, sir.

Judge Pugh: Objection sustained.

Q. Now, Lieutenant, what first communication, or contact, did you have with the five defendants here, and what were they doing at that time?

Mr. Duncan: I object, your Honor. That is the same question, if I understand it correctly.

Judge Pugh: The objection is over-ruled.

A. The defendants broke from the picket line and went from the picket line—

Judge Pugh (interrupting the witness): Just tell when they came on to the private property of the Glen Echo Amusement Park.

A. Approximately 8:15.

Judge Pugh: All five of them?

[fol. 11] A. Yes, sir.

Judge Pugh: All right. Start from there.

Mr. McAuliffe: The warrant in this case charges a wanton trespass and, for purposes of showing that, I think the State should be permitted to show that they did, in fact, carry signs, proclaiming the policy of the park, and that they were aware of the policy of the park.

Judge Pugh: There is no law against carrying signs; is there?

Mr. McAuliffe: We have a right, I think, to show that they knew the policy of the park with respect to segregation at the time.

Judge Pugh: I just want to know if there was any trespass under the statute.

Q. What, if anything, occurred then?

Judge Pugh: On the property of Glen Echo Amusement Park.

A. The five defendants went down through the park to the carousel and got on to the ride, on the horses and the different animals. I then went up to Mr. Woronoff and asked him what he wanted me to do. He said they were trespassing and he wanted them arrested for trespassing, if they didn't get off the property.

Q. What did you tell them to do?

A. I went to the defendants, individually, and gave [fol. 12] them five minutes to get off the property.

Mr. Duncan: I object and move to have that answer stricken. It is not relevant.

Judge Pugh: The objection is over-ruled.

Q. Then, Lieutenant, will you relate the circumstances under which you went to the carousel, and what you did when you arrived there with respect to these five defendants?

A. I went to each defendant and told them—

Q. (interrupting the witness) First of all, tell us what you found when you arrived there. Where they were, and what they were doing.

A. Each defendant was either on a horse, or one of the other animals. I went to each defendant and told them it was private property and it was the policy of the park not to have colored people on the rides, or in the park.

Q. Now, will you look upon each of the five defendants and can you now state and identify each of the five defendants seated here as being the five that you have just referred to?

A. These are the five defendants that I just referred to.

Mr. Duncan: I would object to that and ask that he be required to identify each defendant individually. These are five separate warrants.

Judge Pugh: Can you identify each one of these defendants individually?

[fol. 13] A. Yes.

By Judge Pugh:

Q. Did you tell them to get off the property?

A. Yes.

Q. What did each one of them say when you told them that?

A. They declined to leave.

Q. What did they say?

A. They said they declined to leave the property. They said they declined to leave and that they had tickets.

Mr. Duncan: I renew my objection. There has been no individual identification of these defendants.

Judge Pugh: He recognizes these defendants. He didn't know their names at the time. The objection is over-ruled.

Direct examination (continued).

By Mr. McAuliffe:

Q. Lieutenant, will you step down there and point to each of the defendants that you recognize as being one of

the five persons you saw there that night. (The witness leaves the witness stand and approaches defendants' table.)

A. This gentleman here.

Mr. McAuliffe: Can we stipulate as to that, or may he rise and give his name? Can we have the record show that the Lieutenant is now pointing to the first of the five defendants seated here?

[fol. 14] (The witness continues) Also this gentleman here; this gentleman here; this one here, and this one here.

Mr. McAuliffe: Let the record show, if the Court please, that Lieutenant Collins has pointed to each of the five defendants seated here, and pointed them out.

Mr. Duncan: I would like to object to that procedure, and again move that it be stricken. We did not oppose the State's motion to consolidate these cases, and for that reason the five defendants are here, seated at the table, and it is very easy for the witness to say "Oh, yes, these are the five I arrested", but I submit in a proceeding—

Judge Pugh (interrupting counsel): Lieutenant Collins, is there any doubt in your mind that these five defendants are the five persons that you ordered off the Glen Echo property?

A. No doubt whatsoever.

Judge Pugh: Objection over-ruled.

Examination of the witness (resumed).

By Mr. McAuliffe:

Q. How long did you wait after ordering the five defendants off the property, before taking any further action?

A. Exactly five minutes.

Q. During that time what, if anything, occurred?

A. I walked outside the carousel and the five defendants remained on the ride, and the ride didn't move.

Judge Pugh: Did you ask them who purchased the tickets [fol. 15] to that carousel?

A. They told me they had tickets that had been purchased by white people.

By Judge Pugh:

Q. Who—which one told you that?

A. Saunders. The man with the glasses.

By Mr. McAuliffe (continued):

Q. Lieutenant, I show you this photograph and ask you if you recognize that picture?

A. I do.

Q. And what is that picture?

Mr. Duncan: I object to that, your Honor. I don't see the relevancy of it.

Judge Pugh: He has just asked him what it is. You may object to it when he offers it in evidence.

A. This is a picture of me, warning Saunders about the park's policy.

Q. When was that taken?

A. At 8:15 p.m. on the carousel.

Judge Pugh: Who took the picture?

A. A Star newspaper reporter.

By Mr. McAuliffe:

Q. And is that picture a fair and reasonable representation of the scene that you have just testified to, when you warned the defendant, Saunders?

[fol. 16] A. It is.

Mr. McAuliffe: We offer this into evidence as State's Exhibit Number One.

Mr. Duncan: Your Honor, I object to this. This is a photograph of two individuals, one of whom apparently is Lieutenant Collins, and the other, apparently, the defendant, Saunders. Lieutenant Collins testifies that this is a photograph of him, while he was warning the defendant,

and I submit the photograph does not support any statement of warning whatsoever.

Judge Pugh: Lieutenant, did you ask any of these defendants whether or not they saw the signs before they came on the property?

A. No, sir.

Q. You don't know whether they saw the sign or not?

A. I didn't ask them.

Q. Is the sign in a conspicuous place, where anybody going into the park property can see it?

A. Yes, sir.

Q. Where is it?

A. There are eight signs at the different entrances.

Mr. Duncan: I object to your Honor's statement. I do not believe there has been any testimony that any signs were present. My objection is that the picture is not relevant, for the reason that if it is offered to show that a warning was given, that picture doesn't show it. One can [fol. 17] not tell from that picture whether Saunders is talking to Collins, or Collins is talking to Saunders. Whether they are having a pleasant conversation or not.

Judge Pugh: Was this taken on the property of the Glen Echo Amusement Park?

A. Yes.

Q. Was it at the time of your notification to get off the property?

A. Yes.

Q. Who took the picture?

A. The Star Reporter. I didn't know the picture was being taken.

Q. How did you get it?

A. They sent it to me.

Judge Pugh: The objection is over-ruled. Admit it in evidence as State's Exhibit Number One.

Examination of the witness (resumed).

By Mr. McAuliffe:

Q. Lieutenant, during the five minutes that you testified you waited after warning the defendants, and they remained on the amusement facilities, what, if anything, occurred with respect to other people in the park?

Mr. Duncan: Objection, your Honor; that is not relevant.

Judge Pugh: What is the purpose of it?

Mr. McAuliffe: To show that the Lieutenant's actions [fol. 18] were completely reasonable under the circumstances.

Judge Pugh: Objection sustained.

Q. During the five minute period that you testified to after you warned each of the five defendants to leave the park premises, what, if anything, did you do?

A. I went to each defendant and told them that the time was up and that they were under arrest for trespassing. I then escorted them up to our office, with a crowd milling around there, to wait for transportation from the Montgomery County Police, to take them to Bethesda to swear out the warrants.

Mr. Duncan: At this point I renew my Motion to quash the warrants.

Judge Pugh: The motion is denied.

Mr. Duncan: May I state what the grounds are, your Honor?

Judge Pugh: You can state that at the end of the case.

Mr. Duncan: I am required to state this at the beginning.

Judge Pugh: You have stated your Motion and the Court has ruled on it. You may argue it to the Court of Appeals.

Examination of the witness (resumed).

By Mr. McAuliffe:

Q. Lieutenant, I show you this plat, and ask you if you know what that plat is?

[fol. 19] A. This is a plat of the property that Glen Echo occupies in Montgomery County.

Q. Is that the Glen Echo Amusement Park that you refer to?

A. Yes, sir.

Mr. McAuliffe: May we have this plat marked for identification as State's Exhibit Number Two?

Judge Pugh: It may be marked for identification.

Q. Lieutenant, referring to that plat, State's Exhibit Two for identification, can you point to the spot, or establish on that plat the spot where the defendants were at the time you referred to when they were on the carousel?

Mr. Duncan: I object to that, your Honor. The plat has not been offered into evidence.

Mr. McAuliffe: We proffer to offer the plat in evidence, but we do not seek to show the markings to the Court at this time. We will call our next witness to establish the authenticity of the plat.

Mr. Duncan: I object, your Honor.

Judge Pugh: Pass over that question at the present time and call him back after the survey has been introduced.

By Mr. McAuliffe (continued):

[fol. 20] Q. Lieutenant, immediately prior to the time that these five defendants entered on to the property of the Glen Echo Park, what signs were they carrying?

Mr. Duncan: I object to that, on the same ground. What they were doing on a public street is not relevant.

Judge Pugh: Did they carry the signs on the property of the Glen Echo Park?

A. No, sir.

Mr. McAuliffe: The warrants have charged a wanton trespass. If the defendants intend to claim that the defendants were not aware of the policy of the park—

Judge Pugh (interrupting counsel): We are trying a simple trespass case. We do not care what signs they carried off the property. We are not trying a racial case. We are trying a simple trespass case under the statute. The objection is sustained.

Examination of the witness (resumed).

By Mr. McAuliffe:

Q. Lieutenant, how were you dressed at the time you approached the defendants and when you warned them?

A. I was in uniform.

Q. What uniform was that?

A. Of the National Detective Agency; blue pants, white shirt, black tie and white coat and wearing a Special Deputy Sheriff's badge.

Q. What is your position, or capacity, with respect to [fol. 21] being a Deputy Sheriff? Are you, in fact, a Deputy Sheriff of Montgomery County?

A. I am a Special Deputy Sheriff of Montgomery County, State of Maryland.

Q. And specifically by what two organizations are you employed?

A. Rekab, Inc., and Kebar, Inc.

Mr. McAuliffe: You may cross-examine.

Mr. Duncan: Is it my understanding that this witness' duties have been admitted, subject to proof?

Judge Pugh: Subject to agency. Agency has not been established yet. I sustained the objection on that proffer.

Cross examination.

By Mr. Duncan:

Q. You just said you are employed by Rekab, Inc., and Kebar, Inc., is that correct?

A. I am employed by the National Detective Agency and they have a contract with Kebar, Inc., and Rekab, Inc.

Q. Who pays your salary?

A. The National Detective Agency.

Q. And do you have any other income from any other source?

A. No, sir.

Q. Do you receive any money directly from Rekab, Inc., or Kebar, Inc.?

[fol. 22] A. No, sir.

Q. Your salary, in fact, is paid by the National Detective Agency; is that correct?

A. Yes.

Q. What kind of agency is that?

A. A private detective agency.

Q. Is it incorporated?

A. Yes, sir.

Q. In what State?

A. The District of Columbia.

Q. Are you an officer of that corporation?

A. No, sir.

Q. Are you an officer of either Rekab, Inc., or Kebar, Inc.?

A. No, sir.

Q. Mr. Collins, you testified that you saw these defendants prior to the time they entered the park; is that correct?

A. Yes, sir.

Q. Had you ever seen them before?

A. No, sir.

Q. When you saw them inside the park, did you recognize them as the persons you had seen outside the park?

A. Yes, sir.

Q. Now you stated that you told them it was the policy of the park not to admit colored people. Is that, in fact, the policy of the park?

A. Yes.

[fol. 23] Q. Has it always been the policy of the park?

A. As far as I know.

Q. How long had you worked at Glen Echo Park?

A. Since April 2, 1960.

Q. And before that time were you employed by the National Detective Agency?

A. That is right.

Q. But you were assigned to a place other than Glen Echo?

A. That is right.

Q. To your knowledge, had negroes previously ever been admitted to the park?

A. Not to my knowledge.

Q. Now did you arrest these defendants because they were negroes?

Mr. McAniffe: Objection.

Judge Pugh: Over-ruled.

A. I arrested them on orders of Mr. Woronoff, due to the fact that the policy of the park was that they catered just to white people; not to colored people.

Q. I repeat my question. Did you arrest these defendants because they were negroes?

A. Yes, sir.

Q. Were they in the company of other persons, to your knowledge?

A. Yes, sir.

[fol. 24] Q. Were they in the company of white persons?

A. Where?

Q. When they were on the carousel.

A. There were white persons on the carousel when they were there.

Q. To your knowledge, were they in the company of white persons?

A. One white person was with one of the colored people.

Q. With which colored person was the white person with?

A. This gentleman right here (indicating one of the defendants).

Q. Do you know his name?

A. No, I don't know.

Q. Did you arrest the white person who was in his company?

A. No, sir; I did not.

Q. Why not?

A. At the time we got back to the carousel, she had left. By the time I had these defendants out, she had gone, as far as I know.

Q. Does this policy of Glen Echo Park extend to all negroes, no matter who they are?

Mr. McAuliffe: Objection.

Mr. Duncan: I will rephrase it.

[fol. 25] Q. Does it extend to negroes, without regard to how they are dressed, or how they conduct themselves?

Mr. McAuliffe: Objection.

Judge Pugh: Over-ruled.

Mr. Duncan: Will the Reporter read the question, please?
(the last question was read back).

A. Yes; that is right.

Q. Did it come to your attention, Mr. Collins, that these defendants had tickets when they were arrested?

A. They showed me tickets.

Q. Did you make any offer to these defendants with respect to the tickets which they had? Did you offer to refund them any money?

A. No, sir.

Q. Are you familiar with the manner in which tickets are acquired and sold at Glen Echo Amusement Park?

A. Yes, sir.

Q. Will you tell the Court how that is?

A. They are sold through ticket booths.

Q. Are the ticket booths located inside the park, or are they located at the entrance?

A. Inside the park.

Q. Is there any ticket booth at the entrance to the park?

A. No.

[fol. 26] Q. So the access to the park from the public highway is not obstructed?

A. No, sir.

Q. Now, if you know, is it customary at the park for one person to purchase tickets and transfer them to another?

A. I would not know.

Q. Are you ever at the park, Mr. Collins?

A. Yes.

Q. Have you ever observed tickets being purchased?

A. Yes. I have.

Q. Have you ever seen a father purchase tickets and give them to his children?

A. Yes.

Q. Then you do know that that is done; is that correct?

A. In that case; yes.

Q. Do you know of any other cases in which it is done?

A. No.

Q. Mr. Collins, you testified that you recognized these defendants as being the persons you arrested.

A. That is right.

Q. Do you know the name of any one of them?

A. Yes.

Q. Which ones do you know by name?

A. Marvin Saunders.

Q. What is his name?

A. Marvin Saunders.

Q. I am asking you what you know of your own knowledge.

A. Right now one is all I know.

[fol. 27] Q. And you know him as Marvin Saunders, is that your answer?

A. Yes, sir.

Q. At the time you arrested Mr. Saunders, did you know his name?

A. No.

Q. Had you ever seen him before?

A. Yes, sir.

Q. Where?

A. In the picket line.

Q. You don't know the names of any of the other defendants who are seated at this table?

A. Not sitting right here, but I have the facts in my briefcase here.

Q. My question is, do you know the names of any of the other defendants who are seated at this table?

A. Only Saunders.

Q. Since you don't know Mr. Griffin, on the end there, you don't know whether or not he has a brother; is that correct?

A. I don't know.

Q. Are you positive it was Mr. Griffin you arrested, and not some other person?

A. Yes, sir.

Q. How do you know Mr. Griffin was on the carousel?

A. I saw him there.

Q. How do you remember that you saw this person? There were a lot of people in the park, weren't there?

[fol. 28] A. I was concentrating on these people here at the time.

Q. Were there other people on the carousel?

A. Not colored people.

Q. Were these the only five people in the immediate vicinity?

A. No.

Q. There were other people in the immediate vicinity?

A. Yes.

Q. I want you to tell the Court how you know that Mr. Griffin was on the carousel?

A. I went up to him and told him what the situation was, and I looked at him, and I could see that it was him.

Q. How do you know that it was this man here?

Mr. McAuliffe: I object to this.

Judge Pugh: It is proper cross-examination. Objection over-ruled.

Q. How do you know it was this person here?

A. I recognize him as being the man that was on the carousel.

Q. Were there any negroes on the carousel who were not arrested?

A. Not to my knowledge.

Q. Are you sure?

A. If they were on there, I didn't see them.

Q. If you had seen them, would you have arrested them?

A. Yes, sir.

Judge Pugh: Do you mean just because they were negroes?

[fol. 29] A. Due to the fact that the park is operated on a segregated policy.

Judge Pugh: Would you tell them to get off the property?

A. No. I would notify them they were on private property, and it was not the policy of the park to have negroes in the park.

Cross examination (continued).

By Mr. Duncan:

Q. The next gentleman here now, Mr. Proctor—how do you know Mr. Proctor was on the carousel?

A. Because I talked to him.

Q. And because you talked to him, you know he is the same person who is seated here?

A. Yes.

Q. Was there something distinguishing about his face that made you remember him?

A. No.

Q. Have you talked with him since?

A. No.

Q. Why did you ask this defendant to leave the carousel?

A. Because he was on private property, and the park is segregated.

Q. You said the park was segregated against negroes; is that correct?

A. Yes.

Q. Did you ask him if he was a negro?

A. No, sir.

Q. How did you know he was a negro?

[fol. 30] A. He has the appearance, and all.

Q. Can you say he is not a Romanian?

A. I can't say.

Q. Can you say he is not a Filipino?

Mr. McAuliffe: I object to this. I don't think it is proper. He was warned and he didn't leave.

Judge Pugh: He said he arrested these defendants because they were negroes. In view of that answer I will allow the question.

Q. Did you ask him if he were a negro?

A. No.

Q. Do you now know what his race is?

A. I believe he is a negro.

Q. Why do you believe that?

A. Outward appearance.

Q. Could his outward appearance purport his being a member of any other race, Mr. Collins?

A. I would not know.

Q. Well then, you couldn't say that he was a negro seated there, could you? Have you ever seen a person from the Philippine Islands?

A. Yes.

Q. From Hawaii?

A. Yes.

Q. From Pakistan?

A. Yes.

Q. Have you ever seen anyone from any of those countries [fol. 31] tries who looked like this person here?

A. I don't know what you mean.

Q. I want to find out what your policy is in determining negroes by sight.

A. I don't get your question.

Q. You stated to me, Mr. Collins, that you did not ask Michael Proctor whether he was a negro or not.

A. Yes.

Q. You further testified that you arrested him because he was a negro.

A. Yes.

Q. And I asked you how you knew he was a negro.

A. He didn't deny it.

Q. Did you ask him?

A. No, sir.

Q. You further testified that you thought he was a negro because of his outward appearance; is that correct?

A. Yes.

Q. I am asking you on what basis you concluded, on the strength of his appearance, that he was a negro and not an Armenian, a Tunisian, an Arabian, an Egyptian, or a native of some other country?

A. When I told him of the policy of the park—that negroes were not allowed in the park—he didn't deny it.

Q. Did he say anything?

A. He declined to leave the park.

Q. Did he say anything with respect to his racial identity? [fol. 32]

A. No, sir.

Q. Are you now prepared to say that he is a negro?

A. He didn't deny that he was a negro.

Q. I didn't ask you that. I asked you if you are now prepared to say that Michael Proctor is a negro?

A. In my estimation, he is.

Q. In your opinion he is a negro?

A. In my opinion, yes.

Q. But you are not sure, are you Mr. Collins?

A. I am sure of my opinion.

Q. But you are not sure of his race, are you?

Mr. McAuliffe: I object.

Judge Pugh: The objection is over-ruled.

A. I cannot prove that he is.

Q. You can't prove that he is a negro?

Judge Pugh: He didn't deny that he was a negro?

A. No, he didn't.

Mr. Duncan: Your Honor, I hope we are not at the point where we are under duty to deny being a negro, if such a statement is made.

Q. Mr. Collins, at the time that you first spoke to these defendants, did each one of them tell you that they were holding tickets to ride the device you took them off of?

A. No, sir.

[fol. 33] Q. Did Mr. Griffin tell you that he had a ticket?

A. No, sir; he did not.

Q. Did Mr. Proctor tell you that he had a ticket?

A. He had one in his hand.

Q. Did he offer it to you, or extend it?

A. No.

Q. How did you know he had it?

A. I saw it in his hand.

Q. What about Mr. Saunders? Did he tell you he had a ticket?

A. I didn't see a ticket.

Q. What about Miss Greene, did—

A. I didn't see her ticket.

Q. Let me finish my question, please. Did she say anything to you about having a ticket?

A. No, sir.

Judge Pugh: What kind of ticket was it?

A. An admission to the ride ticket.

Judge Pugh: You mean on the carousel?

A. Yes, sir.

Judge Pugh: You got on the carousel and they were seated on it?

A. Yes, sir.

Judge Pugh: And they had a ticket in their hands?

A. No, sir.

[fol. 34] Judge Pugh: Was the ticket taken up by the ticket collector?

A. No, sir.

Examination of the witness (resumed).

By Mr. Duncan:

Q. How about Mr. Washington? Did you see him with a ticket, or talk to him about a ticket?

A. No.

Q. Is it your testimony that the only ticket you saw was the one held by Mr. Proctor?

A. Yes.

Q. Is it your testimony that only Mr. Proctor had a ticket?

A. As I recall it.

Q. Is there some question in your mind? You were very definite about the identification.

A. He had a ticket in his hand. He may have had more than one ticket. He was holding it up on the rail and I was standing on the ground.

Q. You didn't see tickets in the hands of any of the others?

A. I didn't notice them.

Q. But it is your testimony that they did not tell you they had tickets?

A. They did not.

Q. Describe the conduct of the defendant, Griffin; the gentleman sitting next to you, from the time you first saw him in the Glen Echo property until the time you placed him under arrest.

[fol. 35] A. When I saw him on Glen Echo property, he was on the carousel.

Q. That was the first time you saw him?

A. On Glen Echo property, yes.

Q. How was he dressed?

A. That I do not recall.

Q. You don't recall how he was dressed?

A. Not exactly.

Q. Did he have on a suit?

A. I don't recall.

Q. Shirt and tie?

A. I don't recall.

Q. Sport shirt?

A. I don't recall that.

Q. But you recall that it was this person; is that right?

A. Yes.

Q. Tell me what he was doing when you first saw him, sir.

A. When I first saw him he was on the carousel.

Q. Tell me what he was doing. Was he standing, holding the railing, or sitting on a horse?

A. He was seated on one of the animals.

Q. Which animal; what type?

A. I don't recall.

Q. You don't recall how he was dressed, but you recall him; is that right?

A. Yes, sir.

[fol. 36] Q. Was this a moving horse, or a stationary horse?

A. It was stationary at the time.

Q. The question was, was it a device that moved, up and down, when the carousel was in motion?

A. Most of them do move when the carousel is in operation.

Q. Was he seated astride the horse?

A. I didn't say horse; he was astride one of the animals.

Q. Was he talking to anyone?

A. I believe he was talking to a white girl who was seated opposite him; on the horse beside him.

Q. Did you overhear that conversation?

A. No.

Q. How far away were you?

A. Three feet, probably.

Q. And you couldn't overhear the conversation? He was apparently talking softly then?

A. The music was going.

Q. Did he have anything in his possession other than the ticket you say you saw?

A. Not that I recall.

Q. Would you say, Mr. Collins, that his conduct was peaceful and orderly?

A. At the time I spoke to him.

Q. He didn't become disorderly at any time, in fact, did he?

A. No, sir.

[fol. 37] Q. There was no loud talking?

A. Not that I know of.

Q. And certainly no one was drunk or intoxicated, or anything like that?

A. I wouldn't know.

Q. You arrested them, didn't you?

A. You said no one.

Q. No one of these defendants were intoxicated, were they?

A. As far as I know; no.

Q. You had occasion to talk to each one of them, didn't you?

A. Yes.

Q. Can't you say whether any of them had been drinking or not?

A. No.

Q. Have you had occasion to arrest people for being intoxicated in Glen Echo?

A. Yes.

Q. You are a police officer, aren't you?

A. Yes.

Q. Don't you claim some expert knowledge of such matters?

A. Yes; by their actions.

Q. Based on the actions of these people can't you say that they were not, in fact, intoxicated?

A. As far as I know they were not intoxicated.

[fol. 38] Q. You were very quick to judge this gentleman's race by his appearance. I would like your opinion as to his state of sobriety.

Mr. McAuliffe: Objection.

Judge Pugh: He said they were not intoxicated and did not appear to be. The objection is sustained. Did you smell any odor of alcohol on any of them?

A. No, sir.

Examination continues.

By Mr. Duncan:

Q. You testified that the defendant, Griffin, was peaceful and orderly. Was the same true as to all the other defendants?

A. Yes.

Q. At all times throughout?

A. Yes, sir.

Q. At the time you arrested them, Mr. Collins, did any of them ask to speak to the management?

A. No, sir.

Q. Did any of them tell you that they wanted to ride on the merry-go-round?

A. Yes, sir.

Q. Let's take Mr. Washington, here on the end. Tell me the conversation you had with him at the time you arrested [fol. 39] him and what he said to you.

A. As far as I recall there was no conversation between any of us, only I told them about the policy of the park and they answered me that they weren't going to leave the park.

Q. I am talking about Mr. Washington here on the end. I want to know what you told Mr. Washington.

A. I told him that he was on private property and it was the policy of the park not to cater to negroes and I ordered him off the park property.

Q. Where was he at the time you told him that?

A. On one of the animals on the carousel.

Q. What did he say to you?

A. After five minutes he refused to leave.

Q. He said to you after five minutes that he refused to leave? Is that your answer? I don't want to confuse you. I want to know what he said to you in response to your statement to him.

A. He said he wouldn't leave.

Q. Did he make any statement to you?

A. No.

Q. He remained mute; is that correct?

A. He told me he wasn't getting off the animal; whatever animal he was on.

Q. I repeat my question. Will you tell me what Mr. Washington said to you in response to your initial statement to him?

[fol. 40] A. As far as I recall, he just told me that he wasn't going to get off the carousel.

Q. Did he say anything else?

A. Not that I recall.

Q. Did he tell you that he wasn't going to get off the carousel?

A. Yes.

Q. How was he dressed?

A. I believe he had a sport shirt on.

Q. Let's take Miss Greene; where was she when you talked to her?

A. She was on the carousel.

Q. Do you recall where?

A. Yes; on one of the animals.

Q. What did you say to her, Mr. Collins?

A. I told her the policy of the park, and ordered her off the carousel, and off the property.

Q. And what did she say to you?

A. I believe she said she had a ticket. I don't recall what else.

Q. What about Mr. Saunders? Where was he at the time you arrested him?

A. On the carousel, on one of the animals.

Q. What did you say to him?

A. I told him the policy of the park and ordered him off [fol. 41] the property.

Q. And what did he say?

A. He refused to get off the animal, and I told him I would give him five minutes to do it.

Q. What did he say, Mr. Collins?

A. He said "I am not getting off."

Q. They all said pretty much the same thing; is that right?

A. Yes; as far as I know.

Judge Pugh: How did you get him off the animal?

A. I told him he was under arrest and he got down.

Judge Pugh: Did you grab him by the arm?

A. I didn't have to; he got off.

Judge Pugh: And then did you take them to the office?

A. To our office to await transportation.

Judge Pugh: Is that where you swore out the warrant?

A. No; at the sub-station in Bethesda.

The examination (continued).

By Mr. Duncan:

Q. You testified that you saw each of these five individuals before they entered the park; is that correct?

A. Yes.

[fol. 42] Q. On the 30th of June, 1960, where did you have your first conversation with the defendant, Griffin?

A. On the carousel.

Q. Did you have any conversation with any of the other four defendants prior to your conversation on the carousel?

A. No, sir.

Q. No doubt about that then?

A. No, sir.

Mr. Duncan: I have no further questions.

Redirect examination.

By Mr. McAuliffe:

Q. Did you have any conversation with anyone who identified himself as being the representative of the other five defendants?

Mr. Duncan: Objection.

Judge Pugh: Was that in the presence of these five defendants?

Mr. McAuliffe: It was very close to these defendants.

Judge Pugh: Did someone appear in behalf of these five defendants, who were not individually present at the time you had the conversation with him?

A. Yes, sir.

Judge Pugh: Was it in the hearing of these five defendants?

A. They were walking and he was standing still.

Judge Pugh: Where were they walking to? To the office [fol. 43] where you placed them under arrest?

A. No, the situation is this—

Judge Pugh (interrupting the witness): Was it before or after the arrest?

A. Before the arrest.

Judge Pugh: On the park property?

A. I was on park property and this other individual was on government property.

Judge Pugh: The objection will be sustained. He was off the property.

Examination of the witness (continued).

By Mr. McAuliffe:

Q. Referring to this gentleman seated on the end. What characteristics that he possesses, in your opinion, led you to believe that he was a negro?

A. His color.

Q. What is his color?

A. Black.

Q. And are there any other characteristics that he has which led you to believe that he is a negro?

A. His eyes.

Q. What about his eyes?

A. They are black.

Q. What about his hair?

A. Curly. Kinky.

[fol. 44] Q. Now then, Lieutenant, you warned these defendants, because they were negroes, to leave the park; is that correct?

A. Yes.

Q. Did you arrest them because they were negroes, or because they refused to heed your warning to leave the park?

Mr. Duncan: I object to that. He has already testified that he arrested them because they were negroes.

Judge Pugh: It is a leading question; objection sustained.

Q. Exactly why did you arrest these five defendants?

Mr. Duncan: Objection. That question has been answered before.

Judge Pugh: Objection over-ruled.

A. They were trespassing and refused to leave the property.

Judge Pugh: Not because they were negroes? I thought you testified, on cross-examination, that you arrested them because they were negroes. Is that why you arrested them.

A. They were negroes and refused to leave the property.

Judge Pugh: Do you want to change your testimony on cross-examination now?

[fol. 45] A. No, sir.

Judge Pugh: Well, what did you mean when I asked you if you arrested them just because they were negroes? Is that the sole reason?

A. No, sir; they wouldn't leave the property.

Judge Pugh: There were other reasons then?

A. Yes.

By Judge Pugh:

Q. What were the other reasons?

A. They would not leave the property.

Mr. Duncan: I wonder if that answer should not be stricken; on the grounds that it seems to me the prosecutor is now impeaching his own witness.

Judge Pugh: Over-ruled.

Examination of the witness (resumed).

By Mr. McAuliffe:

Q. Are you familiar with the policy of the ticket sellers at Glen Echo on Glen Echo property with respect to selling to negroes?

A. Yes.

Q. What is that policy?

A. They do not sell to negroes.

Judge Pugh: We are not trying a racial case.

[fol. 46] Q. Did you ascertain whether either one of these five defendants had, in fact, purchased a ticket for a ride on the carousel on June 30th?

A. They did not purchase them, as far as I know.

Judge Pugh: What did they do with the tickets they had in their hand?

A. They kept them.

Q. You didn't take them up?

A. No.

Q. How much were they worth?

A. I think five cents apiece.

Examination of the witness (continued).

By Mr. McAuliffe:

Q. At any time did you note the names of the five persons you arrested?

A. Yes, sir.

Q. When did you do that, Lieutenant?

A. At Bethesda.

Q. And on what did you note these names?

A. First on the warrants and then on our arrest cards.

Q. Do you have the arrest cards with you that were prepared in connection with these defendants?

A. Yes, sir.

Q. By referring to the cards, can you identify them by name?

A. Yes, sir.

[fol. 47] Q. What are their names?

Mr. Duncan: Could we see what he has in his hand?

Judge Pugh: Is that the record that you made?

A. The clerk did.

Q. Was it made under your direction?

A. Yes.

Q. Was it made at the time you arrested them?

A. Yes.

Judge Pugh: You may look at it. (Defense counsel takes the paper from witness and examines it.) Is it necessary for you to look at that piece of paper in order to refresh your recollection?

A. Yes, sir, it is.

Mr. Duncan: Your Honor, these cards contain certain information. May I ask the witness where that information came from?

Judge Pugh: They aren't going into evidence. The witness is using them for the purpose of refreshing his recollection.

Examination of the witness (resumed).

By Mr. McAuliffe:

Q. Having refreshed your recollection as to the names of these defendants that were arrested on June 30th, what are their names?

[fol. 48] A. Cecil T. Washington, Jr., Michael A. Proctor, William L. Griffin, Gwendolyn T. Greene and Marvons Saunders.

Q. You testified on cross-examination, Lieutenant, that these defendants were peaceful and orderly while they were on the carousel, after you had warned them and during that five minute interval that you gave them before arresting them. Were there any persons admitted to the park and in the immediate vicinity of these five defendants, who were not peaceful and orderly at the time?

Mr. Duncan: We object.

Judge Pugh: Did these defendants have any other people with them?

A. There was a large crowd around them from the carousel up to the office.

By Mr. McAuliffe (continued).

Q. And prior to the arrest, during this five minute interval that you gave them as a warning period, was there a crowd gathering at that time?

A. Yes, sir.

Q. And what was the condition, or orderliness, of that crowd as it gathered there?

Mr. Duncan: I object to that question, your Honor. Mr. Collins has testified that he arrested these persons for no [fol. 49] other reason than that they were negroes, and gave them five minutes to get off the property.

Judge Pugh: Was there any disorder?

A. It started a disorder because people started to heckling.

Judge Pugh: They weren't connected with these defendants, were they?

A. No, sir.

Judge Pugh: Objection sustained.

Mr. McAuliffe: That concludes our examination of Lieutenant Collins, subject to a right to recall him for purposes of identifying the location on the plat.

Recross examination.

By Mr. Duncan:

Q. You said you were able to identify Mr. Griffin by his appearance, which you described as "black", "black eyes and kinky hair;" is that the way you tell negroes?

A. Either that or ask them.

Q. One of those two ways?

A. Yes.

Q. And by your definition, all negroes look pretty much [fol. 50] alike to you, don't they?

A. Pretty near.

Q. Mr. Collins, do you hold any degrees from any college or university?

A. No, sir; I don't.

Q. Have you ever taken any courses of study from any colleges or universities in the field of sociology or anthropology?

A. No, sir.

Q. Have you ever done any reading on those subjects, as a hobby or vocation?

A. No, sir.

Q. In light of your answer to Mr. McAuliffe, that you knew that Mr. Griffin was a negro for the reasons that you gave, how did you know that Mr. Proctor was a negro?

A. He didn't deny it.

Mr. Duncan: I have no further questions.

Mr. McAuliffe: That is all I have.

(Short recess.)

[fol. 67] ABRAM BAKER, a witness of lawful age, called for examination by counsel for the plaintiff, and having first been duly sworn, according to law, was examined and testified, upon

[fol. 73]

Direct examination.

By Mr. McAuliffe (continued):

Q. Directing your attention to this lease, State's Exhibit #7, Mr. Baker, I ask you whether that lease was in effect on the date of June 30th of this year?

A. Yes, sir; it was.

Q. Now, as President of Rekab, Inc., and Kebar, Inc., will you describe what policy is maintained by the two respective corporations with respect to the admission of negroes to the Glen Echo Amusement Park?

A. I don't get your question.

Q. What policy is maintained by Rekab, Inc., and Kebar, Inc., with respect to the admission of negroes to the amusement park?

A. They are not allowed in the park.

Q. And what instructions and what authority has been given by Rekab, Inc., and Kebar, Inc., by you as President of each of these corporations, to Lieutenant Collins with respect to this park policy?

A. To give them all due respect and if they do not do what he asks them to do within a time that he thinks it should have been done, that he should arrest them.

[fol. 74] Mr. Duncan: Your Honor, I move to strike that answer on the ground that Mr. Collins testified he was employed by National Detective Agency.

Judge Pugh: Did you give Lieutenant Collins any instructions yourself?

A. He used to ask for instructions almost every day on something or other in the park.

Judge Pugh: Proceed.

Mr. Duncan: I renew my objection.

Judge Pugh: Over-ruled.

By Mr. McAuliffe (continued):

Q. Now then, Mr. Baker, what agency does the park employ, specifically what agency does Rekab, Inc., and Kebar, Inc., employ for purposes of maintaining law and order on the park property?

A. This year it was the National Detective Agency.

Q. And who, in the National Detective Agency, was designated as the director or the man in charge of the police force on the park grounds?

A. Lieutenant Collins.

Q. And as such did you have occasion to give Lieutenant Collins any instructions with respect to a park policy [fol. 75] against admitting negroes?

A. Yes.

Q. And what specific instructions did you give him with respect to authority to order people off of the park premises?

A. Well, he was supposed to stop them at the gate and tell them that they are not allowed; and if they come in, within a certain time, five or ten minutes—whatever he thinks, why he would escort them out.

Q. In the event they didn't see fit to leave at his warning, did you authorize Lieutenant Collins to have these people arrested?

A. Yes.

Q. On a charge of trespass?

A. On a charge of trespassing.

[fol. 80] Judge Pugh: Ask another question.

Cross examination of the witness (resumed).

By Mr. Duncan:

Q. Has your corporation, either Rekab, Inc., or Kebar, Inc., entered into any contractual relationship with the National Detective Agency for the purpose of providing service at the park?

A. We have an agreement.

Q. A written agreement?

A. Yes.

Q. Do you have a copy of that agreement?

A. I do not have one with me.

Q. Did you pay the salary of Lieutenant Collins, you or the corporation?

A. We pay the National Detective Agency by check, and they take care of their men.

Q. Do you pay them a lump sum per month, or per year?

A. A lump sum weekly.

Q. For all the services they render to you?

A. That is right.

Q. It is not broken down?

A. It is down in their office.

Q. In other words, you pay them a flat weekly rate?

A. We send the time schedules to their office and [fol. 81] doublecheck with them and then we pay them whatever we owe them for the week.

Q. How is that determined? Do they bill you?

A. Between the auditor in their office and the auditor in our office—that we have the right amount; that the time schedules are correct.

Q. Does the contract to which you have testified relate the duties which the guards in the park have to perform?

A. Yes.

Q. Have you ever had any conversation with Lieutenant Collins, relating to the racial policies of the park?

A. Yes.

Q. When did you first talk to him about your policies?

A. He knew the policy right from the beginning.

Q. I asked you when did you first have occasion to talk to him about that.

A. When he first took over.

Q. When was that?

A. April 2nd, I think, 1960.

Q. Now you talked with him personally?

A. Well if I didn't, my brother did. I can't go back that far. If I didn't, my brother did.

Q. Did you talk with him, personally?

A. I have many times.

Q. I mean, in April 1960, when Mr. Collins took over, did you talk with him, personally, relating to the racial policies of the park?

A. I don't know if it was that day or not, but I did [fol. 82] talk to him.

Q. Have you ever talked with him about the racial policy of the park?

A. Yes.

Q. When, according to your best recollection, did you first talk with him about that?

A. I don't know. I would say it would be April 2nd, but I am not sure. April 2nd, 1960.

Q. Is it your testimony that you talked with him, or your brother talked with him on April 2nd?

A. We both talked to him. If one is there, he talks to him, and—

Q. I want to know what conversation you, Abram Baker, had with Lieutenant Collins.

A. It is all according to what he asked me.

Q. When did you first have occasion to talk with him about the racial policy of the park?

A. We had him sit down, and talked it over the first day.

Q. Were you present at that conversation?

A. That I can't tell you.

Q. You don't know whether you were there or not?

A. I don't know if I was there April 2nd, or whether my brother talked to him.

Q. Will you pick a day, please, when you were there?

A. I don't know.

Q. You have no recollection of talking to him as to the racial policy of the park?

[fol. 83] A. I did; many times.

Q. Well do you think you talked to him in the month of April?

A. I would say so.

Q. Do you mean by that, that you did talk to him during the month of April about that subject?

A. I think so.

Q. Are you in doubt as to whether you did talk to him in the month of April?

A. Well if something didn't come up, why I didn't have to talk to him about it.

Mr. Duncan: Your Honor, I am going to ask the Court's assistance in trying to fix a date.

Judge Pugh: Cross-examine him.

By Mr. Duncan (continued):

Q. Did you have any conversation with Lieutenant Collins, in the month of May, 1960, regarding the racial policies of the park?

A. I may have.

Q. And you may not have?

A. If nothing turned up, I may not have had to talk to him about it.

Q. Did you have any conversation with him in the month of June, 1960, about the racial policies of the park?

A. Yes.

Q. When was that?

[fol. 84] A. June 30th.

Q. And where did that conversation take place?

A. In my brother's office.

Q. Were you present?

A. Yes.

Q. You, yourself, were present?

A. Yes.

Q. Would you tell the Court what you told Lieutenant Collins relating to the racial policies of the Glen Echo Park?

A. We didn't allow negroes and in his discretion, if anything happened, in any way, he was supposed to arrest them, if they went on our property.

Q. Did you specify to him what he was supposed to arrest them for?

A. For trespassing.

Q. You used that word to him?

A. Yes; that is right.

Q. And you used the word "discretion"—what did you mean by that?

A. To give them a chance to walk off; if they wanted to.

Q. Did you instruct Lieutenant Collins to arrest all negroes who came on the property, if they did not leave?

A. Yes.

Q. That was your instructions?

A. Yes.

Q. And did you instruct him to arrest them because they were negroes?

[fol. 85] A. Yes.

Q. Did you instruct him to arrest white persons who came on the park property with colored persons?

A. If they were doing something wrong, they are supposed to be arrested.

Q. In other words, your instruction as to negroes was to arrest them if they came into the park; and refused to leave, because they were negroes; and your instruction was to arrest white persons if they were doing something wrong?

A. That is right.

Q. What did you mean when you told Lieutenant Collins to arrest white persons who came into the park property, if they were doing something wrong?

Mr. McAuliffe: Objection.

Judge Pugh: Read the question back. (Last question was read by the reporter) Objection over-ruled.

A. Well if they were in the picket line and then ran out into the park and we told them to leave and they refused, why shouldn't you arrest them?

Q. So, doing something wrong includes associating with negroes for the purpose of going into the park; is that correct?

A. I don't understand.

Q. You testified that your instructions to Lieutenant Collins, in respect to white people, was to arrest them if they were doing something wrong.

A. That is correct.

[fol. 86] Q. I am trying to find out what you meant by "something wrong", and I asked you whether or not associating with negroes who were in the park would be what you meant.

Mr. McAuliffe: Objection; we are not trying a racial case.

Judge Pugh: Objection over-ruled; answer the question.

A. I still say, if they were in the picket line—I gave him orders if they came out of the picket line on to my private property, I wanted them arrested.

Q. This is as to white persons?

A. That is right.

Q. As to negroes, did you give Lieutenant Collins any further instructions, other than to arrest them if they came on to the premises?

A. What is that?

Q. As to negroes, other than instructing Lieutenant Collins to arrest them if they came into the park, did you tell Lieutenant Collins anything else as to what his duties were, or should be, with respect to negroes who came on park property?

A. He knows what he is supposed to do.

Q. I am sure of that, but I am trying to find out what you told him to do.

A. I told him to give them sufficient time to walk off, or otherwise they would be arrested.

Q. Did you instruct him as to how he should determine who was a negro and who was not?

[fol. 87] A. No.

Q. You left that up to him? That was within his discretion; is that correct?

A. Yes.

Q. Did you make any exceptions to those instructions you gave him?

A. No.

Q. So you instructed him, for instance, to arrest a negro maid, if she came on with white children?

A. They usually call up—a white person would ask if it would be all right for them to bring the children in, if they didn't do anything in the park, and we would say "It is all right."

Q. You would allow it?

A. Yes.

Q. Have negroes ever attended Glen Echo Park prior to June 30, 1960, as patrons?

Mr. McAuliffe: Objection.

Judge Pugh: Objection over-ruled. You may answer it.

A. Not to my knowledge.

(Lunch recess.)

1:45 p.m.

Examination of the witness (resumed).**By Mr. Duncan :**

Q. Before we adjourned for lunch, I was asking you about instructions you gave Lieutenant Collins with reference to excluding negroes from the park. Did you in- [fol. 88] struct Lieutenant Collins to exclude all negroes who appeared there?

A. Yes, sir.

Q. Without regard to the way they conduct themselves?

A. Yes.

Q. Without regard to how they were dressed?

A. That is right.

Q. Mr. Baker, we have established that you had a conference with Lieutenant Collins, on or about the 30th of June, 1960; I believe it was also your testimony that he came into your employ on or about the 2nd of April, 1960. I would like to ask whether, between the time he began working at Glen Echo and the time this occurrence happened, did you, yourself, have any conversation with Lieutenant Collins, relating to his duties if negroes came to the park as patrons. Between April 2, 1960 and June 30, 1960—between those two dates, did you have any conversation with Lieutenant Collins in which you gave him instructions as to what he should do in the event negroes presented themselves at the park as patrons?

A. He would come to me if anything happened, first.

Q. Let's go back to the time when he first came into your employ. Did you meet with him to instruct him generally about your policies?

A. That is right.

Q. Did you, yourself, meet with him?

A. Yes.

Q. Can you give the approximate time?

A. The park opened April 2nd; I don't know.

Q. Would you say that sometime around April 2nd you [fol. 89] had a conversation with Lieutenant Collins?

A. I would say so.

Q. Now in that conversation did you give him instructions relating to the treatment to be accorded negroes?

A. To everybody.

Q. Did you give him instructions about the treatment to be accorded to negroes specifically?

A. Not that I know of.

Q. When did you first give him instructions after April 2nd, 1960, relating to the treatment to be accorded to negroes?

A. I didn't have to. That has been the policy of the park ever since it started.

Q. Is it your testimony that you did not, prior to June 30th, give him that instruction?

A. He got his instructions at the beginning of the season. He knew what to do.

Q. From whom did he get his instructions?

A. From me and the Manager.

Q. All right. What instructions did you give him?

Judge Pugh: Haven't you been all over that?

Mr. Duncan: I took it through, month by month, and the first time he stated he gave any instructions was on the 30th of June and that is the date of the arrest.

Judge Pugh: He has now said that policy has been in effect since the park started. He said just before the arrest in this case Lieutenant Collins reported to him that there were negroes in the park and he told him to exclude them. [fol. 90] Tell them to get off the property.

By Mr. Duncan (continued):

Q. You testified you told Lieutenant Collins to arrest these negroes, if they didn't leave, for trespass. Is that correct?

A. Within a reasonable time.

Q. And you said you used the word "trespass"; is that correct?

A. Yes.

Q. Did you give him any instructions which section of the statute to make the arrest under?

A. I didn't know of any section.

Q. Did you draw any distinction in your instruction between trespassing and wanton trespassing?

A. I really don't know the difference.

Q. Do you recall ever having used the term "wanton trespass" to Lieutenant Collins?

A. No, I do not.

Q. You were relying on his knowledge, as a police officer, as to the mechanics of the matter?

A. That is right.

Q. As President of these two corporations, are you familiar with their advertising policies?

A. We have an agency.

Q. What agency is that?

A. The advertising agency advertising the park. Do I have to answer that?

Judge Pugh: You just use the newspapers, don't you?
[fol. 91] The Witness: We have an advertising agency.

Mr. Duncan: One of the specific defenses in the statute, in Section 5770 says "that nothing in this section shall be construed to include within its provisions the entry or crossing over such land unless such entry or crossing is done under a bona fide right." We are trying to establish that the park advertised publicly, and did not exclude negroes in its advertising.

Judge Pugh: Objection over-ruled.

Cross examination (continued).

By Mr. Duncan:

Q. What is the name of that advertising agency?

A. Kal Ehrlich.

Q. Have you had any conferences with any representatives of that agency, relating to the advertising program which they would engage in on your behalf?

Mr. McAuliffe: I object to this line of questioning.

Judge Pugh: I think you are going too far afield, Mr. Duncan.

Mr. Duncan: One defense to the statute is that I think if I can show that the park invited the public, generally,

to come use these facilities, without any mention being made of race—

Judge Pugh: The advertising didn't say anything about negroes?

Mr. Duncan: No.

[fol. 92] Mr. McAuliffe: Of course the State attempted to introduce evidence to show that these five defendants were on a picket line and had full knowledge of the park policy, so the advertising would be completely irrelevant. The evidence is that they came right off the picket line and went into the park, so the evidence is clear that they were not misled, but that they had full knowledge of the park policy when they went in, and on that basis we object to this as being irrelevant.

Mr. Duncan: Mr. McAuliffe's recollection is different from mine.

Judge Pugh: I don't know what your defense is. Your plea up to now is "not guilty." You didn't make an opening statement. I don't know exactly what your defense is.

Mr. Duncan: They were there under a claim of right, and one of the defenses is that they were invited to come there and I am trying to establish the fact that the park does advertising, without mentioning race. I proffer, through this witness and through witnesses I will recall, to show that.

Judge Pugh: On that proffer the objection will be overruled.

Cross examination of the witness (continued).

By Mr. Duncan:

Q. Does Glen Echo, operating through its advertising agency, advertise in the Washington, D. C. area?

A. I would say so.

Q. Does it advertise in the Press?

[fol. 93] A. What do you mean "The Press?"

Q. By newspapers?

A. Yes.

Q. By radio?

A. Yes.

Q. And by television?

A. Yes.

Q. On the back of Capital Transit Busses?

A. No.

Q. It does not?

A. No, sir.

Q. Do any of the advertisements which the park makes refer to racial policies of the park?

A. I don't get that.

Q. Do any of the advertisements which you have referred to, refer to the racial policies of the park?

A. I don't think so.

Q. Do any of them state that negroes are not welcome?

A. They didn't say they were.

Q. Are they addressed to the public generally?

A. I would say so.

Q. Do you happen to know what your advertising budget is for the year?

Mr. McAuliffe: Objection.

Judge Pugh: What is the question? (Last question read by the reporter). Objection sustained. Who determines the policy of the Glen Echo Park, of which you are President. [fol. 94] Is that also determined by some act of the corporation?

A. Its just been that way for years and years; that's all.

Judge Pugh: You mean it is just handed down by custom?

A. Yes.

Judge Pugh: Do you admit Chinese?

A. Yes.

Judge Pugh: Filipinos?

A. Yes.

Judge Pugh: And somebody from India; do you admit them?

A. Yes.

Judge Pugh: And the only ones you exclude are the negroes?

A. Yes.

Judge Pugh: There is no official act of the corporation that bears that out; it is just handed down from year to year?

A. That is right.

Cross examination (resumed).

By Mr. Duncan:

Q. Who in the corporate hierarchy determines that policy?

A. Who what?

Q. Who in the corporation determines that that policy shall continue in effect?

A. We all do.

Q. Are you referring to officers or stockholders?

A. Whoever is in charge at that time. They know that that is the way it is supposed to be.

Q. Is this a closely held corporation?

A. Yes, sir.

[fol. 95] Q. How many stockholders are there?

A. Three.

Q. How many different persons serve as officers?

A. Three.

Q. Are they the same three who are the stockholders?

A. Yes.

Q. And you say that this has always been the policy of the park?

A. That is right.

Judge Pugh: Has your corporation filed any civil suits, or asked the Court for any injunction to prohibit colored people from coming on your property?

A. No, sir.

Q. It never has done that?

A. No, your Honor.

By Mr. Duncan (continued):

Q. Mr. Baker, at any time in the past five years has there ever been a meeting of the Board of Directors, at which the racial policies of the park were considered and discussed?

A. No, sir.

Q. Not in the past five years?

A. No, sir.

Q. On the night of June 30th, did Lieutenant Collins speak to you about these specific defendants?

A. I wasn't there.

Q. You were not where, sir?

A. I wasn't at the park on the night of June 30th.

[fol. 96] Q. Did you have a discussion with Lieutenant Collins on the 30th of June, 1960, about the racial policy of the park?

A. I don't remember.

Mr. Duncan: I have no further questions.

Examination by the Court.

By Judge Pugh:

Q. I think you testified, on direct, or cross examination, that your corporation had deputy sheriffs, or somebody similar to Lieutenant Collins' position, at the gate of the Glen Echo Amusement Park; is that correct?

A. Yes.

Q. On this particular night did you have such a person at the entrance to the park, so far as you know?

A. They were supposed to be there.

Q. Is that officer directed to tell the negroes not to come in?

A. I left the General Manager there to oversee everything.

Q. Is he here in Court today?

A. Yes.

Redirect examination.

By Mr. McAuliffe:

Q. Did you have a conversation with Lieutenant Collins on the 30th day of June, at any time or any place?

A. When the newspaper people came out and said that there was going to be something going on that night, I told [fol. 97] him to continue the policy.

Q. Where were you when you spoke to him at that time?

A. That was in the daytime, in my office.

Q. And was that at the Glen Echo Amusement Park?

A. Yes; it was.

Q. And that is when you had this conversation that you related to the Court, in which you instructed Lieutenant Collins as to how this situation was to be handled?

A. I don't get that.

Q. Is that when you had this conversation, which you previously related, in which you instructed Lieutenant Collins how the situation with respect to negroes was to be handled?

A. That is right.

Q. And that was prior to the time the five defendants in this case came on to the property and were arrested by Lieutenant Collins?

A. That is right.

Q. Do you know how long the Glen Echo Amusement Park has been in existence, and how long it has maintained a policy of segregation?

A. Fifty-one years.

Q. Did you instruct Lieutenant Collins that he was to arrest negroes because they were negroes, or because they were trespassing?

A. Because they were trespassing.

Mr. McAuliffe: That is all.

[fol. 98] Recross examination.

By Mr. Duncan:

Q. Did you instruct Lieutenant Collins to arrest any other persons who trespassed, other than negroes?

A. I went over that once before with you. I told him if they came out of that picket line to come on to the property, to give them due notice and to arrest them if they didn't leave; white or colored.

Q. Did you, on the 30th of June, 1960, see Lieutenant Collins at all, anywhere?

A. I saw him in the afternoon.

Q. What time in the afternoon; approximately?

A. Three thirty or four o'clock.

Q. Where did you see him?

A. When he came into the office and told me about the reporters.

Q. What office did he come into?

A. My office.

Q. Located where?

A. At the entrance to the park.

Q. On park property?

A. Yes.

Q. Did you have a conversation with him at that time?

A. Yes.

Q. Will you tell the Court, please, what conversation you had with Lieutenant Collins at that time?

Judge Pugh: Haven't you testified to that before?

[fol. 99] A. As far as I know.

Mr. Duncan: In response to the question I put, he said he didn't talk to Lieutenant Collins on the 30th of June.

Judge Pugh: All right. Go ahead, answer it.

A. When the reporters came that afternoon, when they heard about it, he came in and told me that there would be trouble that night, and we went over the same thing.

Q. Did you talk to him subsequently, at the time these defendants were arrested?

A. No.

Q. Do you know what time they were arrested?

A. No.

Q. So Lieutenant Collins did not consult you prior to the time they were arrested?

A. No. My General Manager took care of that.

Q. In your instructions to Lieutenant Collins to arrest negroes for trespassing, were they arrested for any other reason than that they were negroes?

A. You asked me before about anybody else and I told you yes.

Q. Well, were negroes to be arrested for trespassing—was that determination made on the basis of the fact that they were negroes? You wouldn't arrest anybody else that just walked into the park, would you, Mr. Baker?

A. If they were picketing and they came out of the line, white or colored, we are supposed to give them due notice and—

[fol. 100] Q. (interrupting the witness) Well, suppose a negro wasn't picketing, but just came out there and walked into the park, would your instructions apply to him?

A. Lieutenant Collins would get in touch with the gentleman, and tell him that he wasn't wanted in the park.

Q. And he wasn't wanted solely because he was a negro, isn't that correct?

A. So far as I know.

Q. You determine the policy of this corporation, don't you?

A. Yes.

Q. Well, is there any doubt in your mind that that is why you told him he wasn't wanted?

A. No.

Re-redirect examination.

By Mr. McAuliffe:

Q. Who are the other officers of this corporation?

A. My brother.

Q. What is his position?

A. Secretary and Treasurer.

Q. What is his name?

A. Sam Baker.

Q. Who is the other officer of the corporation?

A. My wife.

Q. And have you and your brother, and your wife, conferred, and are you in agreement with respect to the policy to be followed at Glen Echo Park?

A. We sure are.

[fol. 101] Q. And who is your General Manager at the Glen Echo Park?

A. Leonard Woronoff.

Q. And is he instructed to carry out all the policies by you and your brother and your wife, with respect to the operation of the park, as you see fit?

A. He is.

Q. You take the position, Mr. Baker, that as the owner of this private property, or as President of the corporation, you have the right to determine who shall come on to your property, and the right to arrest them if they do not leave?

A. Yes.

Mr. McAuliffe: I object to that.

Judge Pugh: Objection sustained.

FRANCIS J. COLLINS, recalled to the stand for further examination by counsel for the plaintiff, testified

Direct examination.

By Mr. McAuliffe:

Q. Directing your attention to State's Exhibit #2, will you take this pen which I hand you and mark on there with an "X", and circle that X; in the approximate area where the five defendants were at the time that you talked with them and had occasion subsequently to arrest them, some five minutes later. Make a large "X" and a circle, so we can see it. (The witness complies).

[fol. 102] Mr. McAuliffe: You may cross-examine him.

Cross examination.

By Mr. Duncan:

Q. Have you ever seen this plat before, Mr. Collins?

A. Yes, sir.

Q. Where did you see it, Mr. Collins?

A. In the State's Attorney's office.

Q. When?

A. Thursday of last week.

Q. Was that the first time you had seen it?

A. Yes, sir.

Mr. Duncan: I have nothing ~~further~~.

LEONARD WORONOFF, a witness of lawful age, called for examination by counsel for the plaintiff, and having first been duly sworn, according to law, was examined and testified upon

Direct examination.

By Mr. McAuliffe:

Q. What is your name, and what is your address?

A. Leonard Woronoff, 1678 North 21st Street, Arlington, Virginia.

Q. What is your position, if any, with Rekab, Inc., and Kebar, Inc.?

A. General Manager of Glen Echo Amusement Park.

Q. And as General Manager what are your duties and [fol. 103] responsibilities?

A. My duties are to execute the policies as set forth by the officers of the corporation, the owners of the amusement park.

Q. What are those policies with respect to the admission of negroes to the park as patrons?

A. The policy has been and is to maintain the park on a segregated basis.

Q. What are your duties and responsibilities with respect to the special police who are on duty and hired by Rekab, Inc., and Kebar, Inc., at Glen Echo Amusement Park?

A. Well I issue instructions. The officers there, our security force, report to me, and I am responsible for their conduct.

Q. Directing your attention to the date of June 30th, prior to the arrest of the five defendants in this case, did you have occasion to discuss with Lieutenant Collins what action, if any, he should take with respect to the five defendants in this case?

A. Yes, sir.

Q. And when was that discussion held, Mr. Woronoff?

A. That was held when I was notified in the office that these defendants had, in fact, gone into the park and were at that time on the carousel.

Q. From whom did you receive such notification?

A. By Lieutenant Collins.

Q. As the result of gaining that information, what did you do, as the General Manager of Glen Echo Amusement [fol. 104] Park and what instructions did you give to Lieutenant Collins?

A. I instructed Lieutenant Collins to notify them that they were not welcome in the park, and we didn't want them there, and to ask them to leave, and if they refused to leave, within a reasonable length of time, then they were to be arrested for trespass.

Q. Are you familiar with Glen Echo Park?

A. Yes, sir.

Q. And on whose property is the carousel located in Glen Echo Park?

Mr. Duncan: I object to that.

Mr. McAuliffe: I will withdraw the question.

Q. Is the Glen Echo Park in Montgomery County, Maryland?

A. Yes, sir.

Mr. McAuliffe: Cross-examine him.

Cross examination.

By Mr. Duncan:

Q. Mr. Woronoff, you said, as General Manager of the park, you were responsible for the conduct of the National Detective Agency officers; is that right?

A. Yes; while they are in our employ at the park.

Q. Does the National Detective Agency make their employees available to you, and you direct them as you see fit?

A. That is correct.

[fol. 105] Q. How many of those officers are also Deputy Sheriffs of Montgomery County?

A. At the present time there are two.

Q. Who, in addition to Mr. Collins?

A. James E. Honniger.

Mr. Duncan: I have no further questions.

Mr. McAuliffe: If the Court please, the State rests.

MOTION TO QUASH THE WARRANTS OF ARREST, ETC.
AND STATEMENT THEREON

Mr. Duncan: May it please the Court, at this time I would like to move to quash the warrants of arrest, or to move for their dismissal, on a number of grounds which I would like to urge on the Court, and the first ground is constitutional grounds, namely, that the application of the Maryland trespass statute, Section 577, under the circumstances of this case, is unconstitutional and constitutes a denial of due process of law. *Marsh v. Alabama*, 326 U. S. 501. The State of Maryland may not assist the owners of the park here in carrying out a pattern of private racial discrimination.

The Supreme Court held in 1947 that although the covenants were valid as private agreements, the State could not enforce them, so we say here the discrimination which may exist at Glen Echo Park is a private matter between the park and the would be negro patrons, but that Glen

Echo cannot call upon the State of Maryland to enforce and carry out that policy.

[fol. 106] In this case I think it is quite clear that the action of the state is resorted to for the purpose of enforcing racial discrimination. They were excluded from the park, not because they were trespassers, but because they were negroes. We contend that these defendants are entitled to the equal protection of the law.

Judge Pugh: Are the property owners entitled to the equal protection of the law?

Mr. Duncan: Most assuredly. We contend further that the application of the statute in this way deprives the defendants of due process of law, because it results in their arrest. We advance a second constitutional argument, your Honor, and that is the interference by the State officers in this case deprives these defendants of statutory rights which are secured to them by the laws of the United States. I refer specifically to Sections 1981, 1982 and 1983 of Title 42 of the United States Code. As your Honor is aware, Section 1981 provides that every person within the jurisdiction of the United States shall have the same right, among other things, to make and enforce contracts, as is enjoyed by white persons, to purchase, acquire, hold and sell real property. It is declared to be a right which everyone shall enjoy. In Section 1983 it is made actionable for any person, acting under color of law, to deprive anyone in the exercise of his Section 1981 right. We submit that the action of Lieutenant Collins in this case, in his capacity as a State police officer, interfered with the equal enjoyment of the [fol. 107] right which these defendants had to attempt to enter into or make contracts with Glen Echo Amusement Park. *Williams v. Kansas City*, 104 Fed. (2nd). So on these two constitutional grounds we move that the warrants of arrest be quashed and dismissed on the ground that the statute as applied to these facts is unconstitutional.

And then we make the same motion on a number of State grounds. First, the Maryland statute, Section 577, begins as follows: "Any person or persons who shall enter upon or cross over the premises of private property, after having been duly notified by the owner, or his agent, not to do so, shall be deemed guilty of a misdemeanor." This

section has only been considered one time by the Court of Appeals of Maryland. *Krauss v. State*, 216 Md. 369. That was a case involving the entry into a garage, by employees of a finance company who were undertaking to repossess an automobile which was in the garage. The owner of the garage land had a lien on the automobile and had had discussions with the defendants prior to their entry, when he notified the defendants that he had a lien on the automobile. Notwithstanding this the defendants entered the land and removed the automobile. Upon conviction, and appeal to the Court of Appeals, that conviction was reversed on the ground that there was insufficiency of notice beforehand. Here we submit, and I think the testimony is uncontradicted on this point—Mr. Collins, himself, testified that his first communication was after they had come on to the land, and I submit to the Court that the statute cannot be violated. We base our motion to dismiss [fol. 108] on the ground that the statute, by its very terms applies only to wanton trespass. Reading again from the statute: "It being the intention of this section only to prohibit any wanton trespass upon the private property of others." We have been unable to find a case which defines the phrase "wanton trespass." The Court of Appeals of Maryland, however, has construed the meaning of the word "wanton" in other circumstances, and I cite on that *Dennis v. Baltimore Transit Co.*, 189 Md. 610, 617, and there, in discussing the meaning of the word "wanton" the Court of Appeals said "the word 'wanton' means characterized by extreme recklessness and utter disregard for the rights of others" and I submit that if this Court were to take that as a test of wanton trespass, then the evidence would have to show that these defendants entered Glen Echo Park with extreme recklessness and complete disregard of the rights of others.

Glen Echo advertised to the public generally. Its advertisements were not restricted as to race and any member of the public was entitled to respond to this advertisement and even if it should eventuate that negroes were excluded wantonness under the statute is further negated by the fact that all of these defendants had tickets, and so far it doesn't appear where they obtained the tickets; but there

is testimony that the tickets were transferable. They had tickets on the merry-go-round, and Mr. Collins testified that he saw the ticket in Mr. Griffin's hand. I submit that a person who enters an amusement park and comes into possession of a ticket, whether purchased by him or given to him by someone else, cannot be said to be guilty of wanton trespass.

[fol. 109] The third ground we base our motion on is that the statute, section 577, provides that—if I may read that section—"and further provided that nothing in this section shall be construed to include in its provisions the entry upon or crossing over any land when such entry or crossing is done under a bona fide claim of right or ownership of said land." Now, we submit that these defendants were on the land in the exercise of several bona fide rights. They were publicly invited on the land. Secondly, upon coming on the land they came into lawful possession of tickets, which, in the ordinary practice of the park, were clearly transferable. And it can be urged on their behalf that they have a constitutionally protected right to be on the land. If the federal statute gives to them the same right to make contracts as white persons, at least they were on the land in the exercise of this federal statutory right and they cannot be said to be engaged in a wanton trespass or that this was not a bona fide claim of right.

For all of these reasons we urge that the warrants in these cases as against all five defendants should be dismissed and I move for a finding of not guilty, based on the insufficiency of the evidence.

DENIAL OF MOTION FOR A DIRECTED VERDICT

Judge Pugh: The motion for a directed verdict is denied.

[fol. 110] KAY FREEMAN, a witness of lawful age, called for examination by counsel for the defendants, and having first been duly sworn, according to law, was examined and testified as follows, upon:

Direct examination.

By Mr. Duncan:

Q. For the record, state your name and address.

A. Kay Freeman; 732 Quebec Place, N. W.

Q. Miss Freeman, are you acquainted with the five defendants in this case?

A. Yes.

Q. Do you know them each by name?

A. Yes.

Q. How long have you known them?

A. I know some of them for different lengths of time. I guess the longest would be two years.

Q. Did you have occasion to be present at Glen Echo Amusement Park on the night of June 30th, 1960?

A. Yes.

Q. Were you in the company of these defendants, and other persons?

A. Yes.

Q. Did you enter the park?

A. Yes, I did.

Q. Did you enter it in company with these defendants?

A. Yes.

Q. Were you on the merry-go-round at the time they were arrested?

[fol. 111] A. Yes.

Q. Did you see them arrested?

A. Yes.

Q. Were you arrested?

A. No.

Q. Did you see each of these defendants arrested?

A. Yes.

Q. Prior to the time they were arrested, did they have tickets to ride on any of the rides?

A. We all had tickets.

Q. Where did you acquire these tickets?

A. They were given to us by friends.

Q. White friends?

A. Yes.

Q. And they had made the purchase?

A. That is right.

Q. Prior to the time that you entered the premises of the Glen Echo Amusement Park, did anyone tell you personally that you should not enter?

A. No one did.

Q. I mean anyone representing the park.

A. No one.

Q. Did Mr. Woronoff say anything to you?

A. No.

Q. Did Mr. Collins say anything to you?

A. No.

Q. Were there any signs posted anywhere around there?

A. I didn't see them.

[fol. 112] Q. The conduct of these defendants at all times was proper, wasn't it?

Mr. McAuliffe: Objection.

Mr. Duncan: I will rephrase it.

Q. What was the conduct of these defendants, during the time they were in the park?

A. Their conduct was orderly.

Q. Have you ever seen any advertisements relating to Glen Echo Amusement Park?

A. Yes every day, on television, on street cars and on radio.

Q. You say you went to Glen Echo in a group, with these defendants?

A. That is right.

Mr. Duncan: I have no further questions.

Examination by the Court.

By Judge Pugh:

Q. Were you told to get out of the park?

A. Yes, I was asked to leave.

Q. They told you to leave?

A. That is right.

Q. And you left?

A. No; I didn't leave.

Q. Were you on the merry-go-round?

A. Yes; I was.

[fol. 113] Q. And Lieutenant Collins asked you to leave?

A. Yes; he asked me to leave.

Q. Did you go along with the other five when they were taken to the office?

A. No; they did not ask me.

Q. You stayed on the merry-go-round?

A. Yes.

Q. And you stayed on there and rode?

A. I did not ride. They did not start the merry-go-round up until after I left.

Q. And then you left the park?

A. Yes.

Cross examination.

By Mr. McAuliffe:

Q. Miss Freeman, this advertisement that you read, is that what brought you out to Glen Echo Park on June 30th?

A. I wanted to use the facilities and I thought this would be a good way of doing it.

Q. You thought you would be able to use the facilities of Glen Echo Park?

A. I thought I might.

Q. Were you led out there by those advertisements?

A. It had been rumored.

Q. What had been rumored?

[fol. 114] A. The segregation policy.

Q. So you knew about the segregation policy?

A. I didn't know. I was told about it.

Q. Did you go out with these five defendants?

A. Yes.

Q. Did you go out with any others?

A. Yes.

Q. How many?

A. Thirty-five or forty.

Q. And you all expected to use the facilities there at Glen Echo Park, in accordance with those advertisements?

A. I expected to use them.

Q. Did you have any signs with you when you went out there?

A. Yes.

Q. What did these signs say?

A. They protested the segregation policy that we thought might exist out there.

Q. They protested with respect to a segregation policy that you thought might exist in the park?

A. That is right.

Q. You weren't sure it existed, but you were taking signs along, just in case it did exist; is that correct?

A. That is right.

Q. How many signs did you have?

A. I don't know.

Q. Did these five defendants have signs?

[fol. 115] A. I don't know. I think we all had signs, at one time or another.

Q. You mean these five defendants then, don't you?

A. I cannot speak for them.

Q. They knew you had signs; didn't they?

A. Yes.

Q. You all came out there, in a group, and you had these signs which protested against the segregation policy of Glen Echo Amusement Park; isn't that right, Miss Freeman?

A. They protested the policy that we thought existed. It was not a fact until we were arrested.

Q. When you got out there to Glen Echo, wasn't Mr. Henry with you?

A. He was in the group.

Q. Do you know Mr. Laurence Henry?

A. Yes.

Q. Didn't he confer with Lieutenant Collins shortly after you arrived on the scene?

A. I don't know. I wasn't near him then.

Q. When you arrived at the Glen Echo Amusement Park, what did you do; put your signs to one side and start to walk in?

A. Some of us carried signs; others didn't.

Q. What did you do?

A. I walked around in a circle.

[fol. 116] Q. Walked around in a circle?

A. That's right.

Q. Since you came there, expecting to go into Glen Echo Amusement Park, and were lead on by these advertisements, why didn't you just walk right into the park?

A. Because everybody else didn't just walk right into the park immediately.

Q. Do you mean these five defendants?

A. And other persons.

Q. What did these five defendants do and other persons do?

A. We had a picket line.

Q. Didn't you try to enter Glen Echo Park before you set up the picket lines?

A. No.

Q. Then you knew the policy of Glen Echo Park was segregated, didn't you?

A. No; we didn't know that until we were arrested.

Q. You mean you set up a picket line before you knew the park was segregated?

A. That is right.

Q. Why did you do that if you didn't know the park was segregated?

A. Because we thought it was segregated.

Q. But you didn't bother to find out before you set up [fol. 117] the picket line?

A. No, we did not.

Q. Wasn't Mr. Henry your so-called Leader?

Mr. Duncan: I object to that, your Honor.

Judge Pugh: The objection is sustained.

Examination by the Court.

By Judge Pugh:

Q. How many car loads of you came out there that night?

A. Five or six.

Q. Did you have all these signs with you?

A. Yes, we did.

Q. Did you go out there to try to make them change their policy?

A. I went to try to use the facilities of the park.

Q. Were you paid anything to go out there?

A. I was not.

Cross examination (continued).

By Mr. McAuliffe:

Q. Do you know of anyone who did receive pay for going out there to Glen Echo Park?

A. No, I do not.

Q. Who contacted you, Miss Freeman, to ask you to go out to Glen Echo Park?

[fol. 118] Mr. Duncan: Objection.

Judge Pugh: The objection is sustained.

Q. Now you say after you got on the park property, tickets were given you by some white friends; is that right?

A. That is right.

Q. Since you weren't sure of the policy of the park, why didn't you try to buy a ticket yourself?

A. It wasn't necessary for me to try to buy a ticket, if somebody had already bought them for us.

Q. And they paid for them?

A. That is right.

Q. Did you reimburse them?

A. I didn't personally reimburse anybody.

Q. Who reimbursed them, Miss Freeman, for your ride?

A. I didn't pay for a ride.

Q. You paid for a ticket, didn't you?

A. I did not personally pay for a ticket.

Q. Who paid for your ticket?

A. I think Paul Dietrich paid for it.

Q. He just gratuitously paid for your ticket?

A. That is right.

Q. And you didn't go up to the ticket booth and try to [fol. 119] purchase any tickets yourself?

A. No, I did not.

Q. And you didn't know whether they would sell you a ticket or not. You just decided it would be better to have Paul Dietrich to get you a ticket; is that right?

A. He offered his services and I didn't see why I should have to pay for a ticket if somebody is going to buy it for me.

Q. And Paul Dietrich is a white person; is that right?

A. Yes; he is.

Q. Now, you were on the carousel, or the merry-go-round, were you not?

A. Yes.

Q. Were you riding with these five defendants?

A. I was near them.

Q. Well; how near?

A. Perhaps two or three rides away.

Q. And when you saw these five defendants being arrested, and taken away, did you remain on the carousel?

A. Yes; I did.

Q. For how long did you remain there?

A. I remained for about thirty minutes.

Q. A half an hour?

A. That is right.

Q. Did the carousel start up during that time?

[fol. 120] A. No.

Q. Was there a crowd around there?

A. Yes.

Q. Did you hear any heckling?

A. Yes.

Q. And did you see any park policemen around there?

A. Yes.

Q. Did you talk with anyone?

A. Lieutenant Collins.

Q. And did he tell you about the policy of the park?

A. Yes.

Q. Did he warn you to leave the park property?

A. Yes.

Q. At the end of thirty minutes, did you leave the park property?

A. I left after the defendants had been arrested.

Q. So your best recollection is that it was approximately half an hour that you sat on that carousel, and the carousel did not start up?

A. No, it did not.

Q. Did it start up after you left?

A. I don't know.

Q. And you just walked out, with some other friends of yours; is that right?

A. That is right.

[fol. 121] Q. Since you weren't arrested—incidentally, you went back in the picket line, didn't you, Miss Freeman?

A. Yes, I did.

Q. Since you weren't arrested, you just walked out of the park and took a place in the picket line; is that right?

A. Yes.

Q. And no one told you you should not enter Glen Echo Park?

A. No.

Q. And you didn't bother to ask anybody before you set up that picket line?

A. I didn't set up the picket line.

Q. Before you took part in it. Before you started walking in this circle.

A. Yes.

Q. Who told you were to walk in this circle?

A. Well, we couldn't—

Q. (interrupting the witness) Wait a minute. How did you know where to walk?

A. Picket lines are usually set up—

Q. (interrupting the witness) I want to know how you knew where to walk.

A. I knew where the entrance to the park was.

Q. The entrance to the park was a short distance away from where you were walking; wasn't it?

[fol. 122] A. Yes.

Q. I want to know how you knew where to walk in this circle?

A. What do you mean?

Q. Didn't somebody tell you to walk there?

A. It was a spontaneous act.

Q. A spontaneous perfect circle?

A. It was not a perfect circle.

Q. And you looked on no one as your leader out there?

A. We were acting, for the most part, as individuals.

Q. It is that little least part that we are interested in. In that little part, who told you what to do? You say "for the most part you acted as individuals" indicating that there was a slight part that you didn't and in that slight part, who told you what to do?

A. No specific individual.

Q. You had no established leader?

A. No.

Q. And you didn't consider Mr. Laurence Henry to be your leader?

A. No.

Q. Nor anyone else there to be your leader?

A. There were those who, perhaps—I can't say that we had one specific leader, I can't say that.

Q. You had several persons who were in a capacity of [fol. 123] leadership; is that what you started to say?

A. Well, certain people said certain things, and if we agreed we went along with it, but there were no definite persons who did everything.

Q. How long did you march in this definite circle, with these five defendants, with these signs, protesting the park's segregation policy, before the five defendants and you entered Glen Echo Park?

A. I don't know.

Q. Would you give us your best estimate on that, please?

A. Maybe an hour or maybe longer.

Q. Your best estimate now would be that it was at least an hour?

A. About an hour.

Q. Do you now recognize each of the five defendants seated at this counsel table as being in that line, which carried signs protesting against the park's segregation

policy, which line protested for an hour before these defendants entered into the park?

Mr. Duncan: I object to that. I am not sure what its relevancy is.

Judge Pugh: Well, you put her on the stand. It is proper cross-examination. Objection over-ruled.

Q. Do you recognize each of these five defendants, seated [fol. 124] at the counsel table, as being in that picket line, that circle of pickets which you have described as being there for about an hour, carrying placards protesting the segregation policy of Glen Echo Park? Do you recognize these five defendants as being in that line and having been there for approximately an hour prior to the time that you and they entered the park?

A. I think that most of them were. I am not positive. It was a rather large line. I cannot be specific and say that each and every one was in the line.

Q. To the best of your knowledge and recollection, they were all there; is that correct?

A. Perhaps.

Redirect examination.

By Mr. Duncan:

Q. Miss Freeman, to your knowledge, have any of your friends, or any persons known by you, ever used the park prior to this arrest?

Mr. McAuliffe: Objection.

Judge Pugh: Objection over-ruled.

A. No.

Q. You said that there was some heckling. Who was [fol. 125] heckling whom?

A. Well the defendants and other persons who were on the merry-go-round were being heckled by the patrons of Glen Echo, and also by some of the people who were working there.

Examination by the Court.

By Judge Pugh:

Q. Was the heckling a loud noise?

A. Yes.

Q. How many people were in it?

A. I don't know, but the merry-go-round was almost surrounded.

Q. In other words, it looked like anything might break out there; a fight?

A. It wasn't that kind of heckling.

Q. How many people would you say were surrounding the merry-go-round when this incident took place?

A. Perhaps forty or so.

Q. You people all knew, when you left Washington, that this park was segregated; didn't you?

A. We didn't know it for a fact.

Q. What did you carry the signs for?

A. We were under the impression that it was segregated.

Q. And you went out there to impress upon them that it [fol. 126] shouldn't be segregated? shouldn't be segregated?

A. I went to see if I could get in.

Q. What did you get together with a crowd for? Why didn't you go by yourself?

A. I would never go to any amusement park alone.

Q. Why didn't you go with one or two people, instead of forty? What was the idea of going out there in large numbers?

A. There was a possibility that it was segregated.

Q. Well you all anticipated that there would be some trouble; didn't you?

A. Yes.

Q. How many men were in the party?

A. It was pretty well mixed.

Q. Well all these were grown men, weren't they?

A. There weren't so many grown men.

Q. You went out there looking for trouble; didn't you?

A. Not trouble; no.

Q. You went out there to try to force them to allow you to go into the park; didn't you?

A. Not to force them to do anything.

Q. Why didn't you stay out of the park, instead of going in there?

A. I wanted to know exactly what would happen.

By Mr. McAuliffe:

Q. You found out what would happen; didn't you?
[fol. 127] A. Yes.

Examination (continued).

By Mr. Duncan:

Q. You weren't arrested, were you?

A. No.

Q. You were in the park, weren't you?

A. Yes.

Q. How old are you?

A. Nineteen.

Q. Do you know how old Miss Greene is?

A. I think Miss Greene is eighteen.

Q. Do you know how old Mr. Saunders is?

A. Twenty-two.

Q. How old is Mr. Washington?

A. I don't know.

Q. How old is Mr. Proctor?

A. I think he is either nineteen or twenty.

Q. Are you a student at any University of learning in this city?

A. Yes, I go to Howard University.

Q. The Court asked you if you anticipated trouble when you went to the park.

A. No, not trouble.

Q. Did you intend to cause any trouble?

A. No.

Q. Did you intend to be disorderly?

[fol. 128] A. No.

Q. Did you intend to force your way in anywhere?

A. No.

Q. Had you discussed what you would do if there were trouble?

A. We didn't expect any real trouble, as far as physical violence is concerned.

Q. Would you say that most of the people that were in the group that accompanied you were the same age as yourself and these young people here?

A. Yes.

Q. Now have you, or anyone with whom you were associated, made any efforts to contact the ownership and management of the park for the purpose of gaining admission, prior to the 30th of June?

A. I have not myself.

Mr. Duncan: We have no further evidence to offer, your Honor, and I would like to renew my motions.

Judge Pugh: We will take a short recess.

(Recess.)

Mr. McAuliffe: Your Honor, for purposes of the record, may we have it shown on the record that State's [fol. 129] Exhibit 3 is the deed, which would be Liber 2072 folio 448, and further for purposes of the record, that the corporation record of Montgomery County, Liber 36 CKW folio 216, the Articles of Incorporation of ReKab, Inc., would be identified as State's Exhibit 4A and that the Montgomery County official corporate record, Liber 36 CKW folio 208, the Articles of Incorporation of KeBar, Inc. would be identified as State's Exhibit 4B. All of them have been admitted in evidence.

Judge Pugh: You just want to change the numbers?

Mr. McAuliffe: Yes.

Judge Pugh: Any objection?

Mr. Duncan: No, your Honor.

Judge Pugh: Change the numbers Miss Reporter. (Exhibit numbers were changed in accordance with Mr. McAuliffe's request.)

Mr. Duncan: I renew my motion for a directed verdict, and to quash the warrants.

Judge Pugh: The motion is over-ruled.

[fol. 130]

ORAL ARGUMENT BY MR. McAULIFFE

ORAL ARGUMENT BY MR. DUNCAN

REBUTTAL ARGUMENT BY MR. McAULIFFE

JUDGE PUGH'S ORAL OPINION.

It is very unfortunate that a case of this nature comes before the criminal court of our State and County. The nature of the case, basically, is very simple. The charge is simple trespass. Simple trespass is defined under Section 577 of Article 27 of the Annotated Laws of Maryland, which states that "any person or persons who shall enter upon or cross over the land, premises; or private property of any person or persons in this State, after having been duly notified by the owner or his agent not to do so shall be deemed guilty of a misdemeanor." Trespass has been defined as an unlawful act, committed without violence, actual or implied, causing injury to the person, property or relative rights of another. This statute also has a provision in it which says that it is the intention of the Legislature as follows: "It is the intention of this section only to prohibit any wanton trespass upon the private land of others." Wanton has been defined in our legal dictionaries [fol. 131] as reckless, heedless, malicious; characterized by extreme recklessness, foolhardiness and reckless disregard for the rights or safety of others, or of other consequences.

There have been many trespass cases in Maryland. As a matter of fact, there is one case now pending before the Court of Appeals of Maryland where the racial question has been injected into a disorderly conduct case, and that is the case of "State of Maryland versus Dale H. Drews", decided some few months ago. In that case, Judge Menchine filed a lengthy written opinion, in which he touched upon the rights of a negro to go on private property,

whether it is a semi-public or actually a public business, and in that case Judge Menchine said as follows:

"The rights of an owner of property arbitrarily to restrict its use to invitees of his selection is the established law of Maryland." This Court agrees with that opinion, and unless that case is reversed by the Court of Appeals of Maryland, at its session this Fall, that will continue to be the law of Maryland.

That statement by Judge Menchine is based upon authorities of this State, and not too far back, in the case of Greenfield versus the Maryland Jockey Club, 190 Md. 96, in which the Court of Appeals of this State said: "The rule that, except in cases of common carriers, inn-keepers and similar public callings, one may choose his customers, is not archaic."

If the Court of Appeals changes its opinion in the [fol. 132] 190 Maryland case, then we will have new law in this State on the question of the right of a negro to go on private property after he is told not to do so, or after being on it, he is told to get off.

In this County, as well as many, many counties in the United States, we have accepted the decision of integration that has been promulgated by the Supreme Court in the school cases, and without any provocations or disputes of any consequence. There is no reason for this Court to change that method of accepting integration, but when you are confronted with a question of whether or not that policy can be extended to private property, we are reaching into the fundamental principles of the foundation of this country.

The Constitution of the United States has many provisions, and one of its most important provisions is that of due process of law. Due process of law applies to the right of ownership of property—that you cannot take that property, or you cannot do anything to interfere with that man's use of his property, without due process of law.

Now, clearly, in this case, which is really a simple case; it is a simple case of a group of negroes, forty in all, getting together in the City of Washington, and coming into Maryland, with the express intent, by the testimony of

one of the defense witnesses, that they were going to make a private corporation change its policy of segregation. In other words, they were going to take the law in their own hands. Why they didn't file a civil suit and [fol. 133] test out the right of the Glen Echo Park Amusement Company to follow that policy is very difficult for this Court to understand, yet they chose to expose themselves to possible harm; to possible riots and to a breach of the peace. To be exposed to the possibility of a riot in a place of business, merely because these defendants want to impress upon that business their right to use it, regardless of the policy of the corporation, should not be tolerated by the Courts. Unless the law of this State is changed, by the Court of Appeals of Maryland, this Court will follow the law that has already been adopted by it, that a man's property is his castle, whether it be offered to the public generally, or only to those he desires to serve.

There have been times in the past, not too many years back, when an incident of this kind would have caused a great deal of trouble. It could have caused race riots, and could have caused bloodshed, but now the Supreme Court, in the school case in 1954, has decided that public schools must be integrated, and the people of this County have accepted that decision. They have not quibbled about it; they have gone along with it without incident. We are one of the leading counties in the United States in accepting that decision. If the Court of Appeals of Maryland decides that a negro has the same right to use private property as was decided in the school cases, as to State or Government property, or if the Supreme Court of the United States so decides, you will find that the places of [fol. 134] business in this County will accept that decision, in the same manner, and in the same way that public authorities and the people of the County did in the School Board decision, but there is nothing before this Court at this time except a simple case of criminal trespass. The evidence shows the defendants have trespassed upon this Corporation's property, not by being told not to come on it, but after being on the property they were told to get off.

Now it would be a ridiculous thing for this Court to say that when an individual comes on private property,

and after being on it, either sitting on it or standing on it, and the owner comes up and says, "Get off my property", and then the party says "You didn't tell me to get off the property before I came on it, and, therefore, you cannot tell me to get off now" he is not guilty of trespass because he was not told to stay off of the property. It is a wanton trespass when he refuses to get off of the property, after being told to get off.

One of the definitions of wanton is "foolhardy" and this surely was a foolhardy expedition; there is no question about that. When forty people get together and come out there, as they did, serious trouble could start. It is a simple case of trespass. It is not a breach of the peace, [fol. 135] or a case of rioting, but it could very easily have been, and we can thank the Lord that nothing did take place of such a serious nature.

It is not up to the Court to tell the Glen Echo Amusement Company what policies they should follow. If they violate the law, and are found guilty, this Court will sentence them.

It is most unfortunate that this matter comes before the Court in a criminal proceeding. It should have been brought in an orderly fashion, like the School Board case was brought, to find out whether or not, civilly, the Glen Echo Park Amusement Company could follow a policy of segregation, and then you will get a decision based on the rights of the property owner, as well as the rights of these defendants. So, the Court is very sorry that this case has been brought here in our courts.

It is my opinion that the law of trespass has been violated, and the Court finds all five defendants guilty as charged.

[fol. 136] Reporter's Certificate to foregoing transcript (omitted in printing).

[fol. 137]

IN THE COURT OF APPEALS OF MARYLAND

No. 248

September Term, 1960

WILLIAM L. GRIFFIN, *et al.*

v.

STATE OF MARYLAND

Henderson

Hammond

Prescott

Horney

Marbury,

JJ.

OPINION BY HORNEY, J.—Filed June 8, 1961

[fol. 138] This is a consolidated appeal from ten judgments and sentences to pay fines of one hundred dollars each, entered by the Circuit Court for Montgomery County after separate trials, each involving five defendants, on warrants issued for wanton trespass upon private property in violation of Code (1957), Art. 27, §577.

The first group of defendants, William L. Griffin, Marvous Saunders, Michael Proctor, Cecil T. Washington, Jr., and Gwendolyn Greene (hereinafter called "the Griffin appellants" or "the Griffins") all of whom are Negroes, were arrested and charged with criminal trespass on June 30, 1960, on property owned by Rekah, Inc., and operated by Kebar, Inc., as the Glen Echo Amusement Park (Glen Echo or park). The second group of defendants, Cornelia A. Greene, Helene D. Wilson, Martin A. Schain, Ronyl J. Stewart and Janet A. Lewis (hereinafter called "the Greene appellants" or "the Greenes"), two of whom are Caucasians, were arrested on July 2, 1960, also in Glen Echo, and were also charged with criminal trespass.

The Griffins were a part of a group of thirty-five to forty young colored students who gathered at the entrance to Glen Echo to protest "the segregation policy that we thought might exist out there." The students were equipped with signs indicating their disapproval of the admission policy of the park operator; and a picket line was formed to [fol. 139] further implement the protest. After about an hour of picketing, the five Griffins left the larger group, entered the park and crossed over it to the carrousel. These appellants had tickets (previously purchased for them by a white person) which the park attendant refused to honor. At the time of this incident, Rekar and Kebar had a "protection" contract with the National Detective Agency (agency), one of whose employees, Lt. Francis J. Collins (park officer), who is also a special deputy sheriff for Montgomery County, told the Griffins that they were not welcome in the park and asked them to leave. They refused, and after an interval during which the park officer conferred with Leonard Woronoff (park manager), the appellants were advised by the park officer that they were under arrest. They were taken to an office on the park grounds and then to Bethesda, where the trespass warrants were sworn out. At the time the arrests were made, the park officer had on the uniform of the agency; and he testified that he arrested the appellants under the established policy of Kebar of not allowing Negroes in the park. There was no testimony to indicate that any of the Griffins were disorderly in any manner, and it seems to be conceded that the park officer gave them ample time to heed the warning to leave the park had they wanted to do so.

The Greene appellants entered the park three days after the first incident and crossed over it and into a restaurant [fol. 140] operated by the B & B Industrial Catering Service, Inc., under an agreement between Kebar and B & B. These appellants asked for service at the counter, were refused, and were advised by the park officer that they were not welcome and were ordered to leave. They refused to comply by turning their backs on him and he placed them under arrest for trespassing. Abram Baker (presi-

dent. of both Rekar and Kekar) testified that it was the policy of the park owner and operator to exclude Negroes and that the park officer had been instructed to ask Negro customers to leave, and that if they did not, the officer had orders to arrest them. There was no evidence to show that the operator of the restaurant had told the Greenes they were not welcome or to leave; nor was there any evidence that the park officer was an agent of the restaurant operator. And while a prior formal agreement¹ covering the 1957 and 1958 seasons had provided that the restaurant operator was subject to and should comply with the rules and regulations concerning the persons to be admitted to the park and that Kekar had reserved the right to enforce them, the letter confirming the agreement for the 1959 and 1960 seasons fixed the rentals for that period [fol. 141] and alluded to other matters, but made no reference whatsoever, either directly or indirectly, to the prior formal agreement—though there was testimony, admitted over objection, to the effect that the letter was intended as a renewal of the prior lease—and was silent as to a reservation by Kekar of the right to police the restaurant premises during the 1959 and 1960 seasons.

On this set of facts, both groups of appellants make the same contentions on this appeal: (i) that the requirements for conviction under Art. 27, §577, were not met; and (ii) that the arrest and conviction of the appellants constituted an exercise of the power of the State of Maryland in enforcing a policy of racial segregation in violation of the Fourteenth Amendment to the Constitution of the United States.

Trespass to private property is not a crime at common law unless it is accompanied by, or tends to create, a breach of the peace. See *Krauss v. State*, 216 Md. 369, 140 A. 2d 653 (1958), and the authorities therein cited. And it was not until the enactment of §21A of Art. 27 (as a

¹ The document was called an "agreement"; the operator of the restaurant was referred to therein as a "concessionaire" and was described in the agreement as a "licensee" and not a "lessee"; yet the agreement called for the payment of rent (payable bi-annually) as well as a portion of the gross receipts and a part of the county licensing fees and certain other items of expense.

part of the Code of 1888) by Chapter 66 of the Acts of 1900 that a "wilful trespass" (see *House Journal* for 1900, p. 322) upon private property was made a misdemeanor. That statute, which has remained unchanged in phraseology since it was originally enacted, is now §577 of Art. 27 (in the Code of 1957), entitled "wanton trespass upon private land," and reads in pertinent part:

[fol. 142] "Any person * * * who shall enter upon or cross over the land, premises or private property of any person * * * after having been duly notified by the owner or his agent not to do so shall be deemed guilty of a misdemeanor * * * ; provided [however] that nothing in this section shall be construed to include * * * the entry upon or crossing over any land when such entry or crossing is done under a bona fide claim of right or ownership * * * ; it being the intention of this section only to prohibit any wanton trespass upon the private land of others."

The Case Against The Griffin Appellants

(i)

The claim that the requirements for conviction were not met is threefold: (a) that due notice not to enter upon or cross over the land in question was not given to the appellants by the owner or its agent; (b) that the action of the appellants in doing what they did was not wanton within the meaning of the statute; and (c) that what the appellants did was done under a bona fide claim of right.

There was due notice so far as the Griffins were concerned. Since there was evidence that these appellants had gathered at the entrance of Glen Echo to protest the segregation policy they thought existed there, it would not be unreasonable to infer that they had received actual notice not to trespass on the park premises even though it had not been given by the operator of the park or its agent. But, even if we assume that the Griffins had not previously had the notice contemplated by the statute which was required to make their entry and crossing unlawful, the record is [fol. 143] clear that after they had seated themselves on the

carrousel, these appellants were not only told they were unwelcome, but were then and there clearly notified by the agent of the operator of the park to leave and deliberately chose to stay. That notice was *due* notice to these appellants to depart from the park premises forthwith, and their refusal to do so when requested constituted an unlawful trespass under the statute. Having been duly notified to leave, these appellants had no right to remain on the premises and their refusal to withdraw was a clear violation of the statute under the circumstances even though the original entry and crossing over the premises had not been unlawful. *State v. Fox*, 118 S. E. 2d 58 (N. C. 1961). Cf. *Commonwealth v. Richardson*, 48 N. E. 2d 678 (Mass. 1943). Words such as "enter upon" or "cross over" as used in §577, *supra*, have been held to be synonymous with the word "trespass." See *State v. Avent*, 118 S. E. 2d 47 (N. C. 1961).

The trespass was wanton within the meaning of the statute. Since the evidence supports a reasonable inference that the Griffins entered the park premises and crossed over it well knowing that they were violating the property rights of another, their conduct in so doing was clearly wanton. Although there are almost as many legal definitions of the word "wanton" as there are appellate courts, we think the Maryland definition, which is in line with the general definition of the word in other jurisdictions, is as good as any. [fol. 144] In *Dennis v. Baltimore Transit Co.*, 189 Md. 610, 56 A.2d 813 (1948), as well as in *Baltimore Transit Co. v. Faulkner*, 179 Md. 598, 20 A.2d 485 (1941), it was said that the word "wanton" means "characterized by extreme recklessness and utter disregard for the rights of others." We see no reason why the refusal of these appellants to leave the premises after having been requested to do so was not wanton in that their conduct was in "utter disregard of the rights of others." Even though their remaining may have been no more than an aggravating incident, it was nevertheless wanton within the meaning of this criminal trespass statute. See *Ex Parte Birmingham Realty Co.*, 63 So. 67 (Ala. 1913).

Since it was admitted that the carrousel tickets were obtained surreptitiously in an attempt to "integrate" the

amusement part, we think the claim that these appellants had taken seats on the carrousel under a bona fide claim of right is without merit. While the statute specifically excludes the "entry upon or crossing over" privately owned property by a person having a license or permission to do so, these appellants do not come within the statutory exception. In a case such as this where the operator of the amusement park—who had a right to contract only with those persons it choose to deal with—had not knowingly sold carrousel tickets to these appellants, it is apparent that they had no bona fide claim of right to a ride thereon, and, absent a valid right, the refusal to accept the tickets was not a [fol. 145] violation of any legal right of these appellants.

(ii)

We come now to the consideration of the second contention of the Griffin appellants that their arrest and conviction constituted an unconstitutional exercise of state power to enforce racial segregation. We do not agree. It is true, of course, that the park officer—in addition to being an employee of the detective agency then under contract to protect and enforce, among other things, the lawful racial segregation policy of the operator of the amusement park—was also a special deputy sheriff, but that dual capacity did not alter his status as an agent or employee of the operator of the park. As a special deputy sheriff, though he was appointed by the county sheriff on the application of the operator of the park "for duty in connection with the property" of such operator, he was paid wholly by the person on whose account the appointment was made and his power and authority as a special deputy was limited to the area of the amusement park. See Montgomery County Code (1955), §2-91. As we see it, our decision in *Drews v. State*, 224 Md. 186, 167 A. 2d 341 (1961), is controlling here. The appellants in that case—in the course of participating in a protest against the racial segregation policy of the owner of an amusement park—were arrested for disorderly conduct committed in the presence of regular Baltimore County police who had been called to eject them from the [fol. 146] park. Under similar circumstances, the appellants

in this case—in the progress of an invasion of another amusement park as a protest against the lawful segregation policy of the operator of the park—were arrested for criminal trespass committed in the presence of a special deputy sheriff of Montgomery County (who was also the agent of the park operator) after they had been duly notified to leave but refused to do so. It follows—since the offense for which these appellants were arrested was a misdemeanor committed in the presence of the park officer who had a right to arrest them, either in his private capacity as an agent or employee of the operator of the park or in his limited capacity as a special deputy sheriff in the amusement park (see Kauffman, *The Law of Arrest in Maryland*, 5 Md. L. Rev. 125, 149)—the arrest of these appellants for a criminal trespass in this manner was no more than if a regular police officer had been called upon to make the arrest for a crime committed in his presence, as was done in the *Drews* case. As we see it, the arrest and conviction of these appellants for a criminal trespass as a result of the enforcement by the operator of the park of its lawful policy of segregation, did not constitute such action as may fairly be said to be that of the State. The action in this case, as in *Drews*, was also “one step removed from State enforcement of a policy of segregation and violated no constitutional right of appellants.”

The judgments as to the Griffin appellants will be affirmed.

[fol. 147]

The Case Against the Greene Appellants

There is not enough in the record to show that the Greenses were duly notified to leave the restaurant by the only persons who were authorized by the statute to give notice. The record discloses that these appellants entered the park and crossed over it into the restaurant on the premises, but there was no evidence that the operator or lessee of the restaurant or an agent of his either advised these appellants that they were unwelcome or warned them to leave. There was evidence that the park officer had ordered these appellants to leave, but it is not shown that

he was authorized to do so by the lessee, and a new written agreement for the 1959 and 1960 seasons having been substituted for the former agreement covering the 1957 and 1958 seasons, the state of the record is such that it is not clear that the lessor had reserved the right to continue policing the leased premises as had been the case during the 1957-1958 period. Under these circumstances, it appears that the notice given by the park officer was ineffective. There is little doubt that these appellants must have known of the racial segregation policy of the operator of the park and that they were not welcome anywhere therein, but where notice for a definite purpose is required, as was the case here, knowledge is not an acceptable notice where the required notification is incident to the infliction of a criminal penalty. 1 Merrill, *Notice*, §509. See also *Woodruff v. State*, 54 So. 240 (Ala. 1911), where it was held (at p. 240) [fol. 148] that "[i]n order to constitute the offense of trespass after warning, it is necessary to show that the warning was given by the person in possession or his duly authorized agent." And see *Payne v. State*, 12 S. W. 2d/528 (Tenn. 1928), [a court cannot convict a person of a crime upon notice different from that expressly provided in the statute]. Since the notice to the Greene appellants was inadequate they should not have been convicted of trespassing on private property, and the judgments as to them must be reversed.

The judgments against the Griffin appellants are affirmed; the judgments against the Greene appellants are reversed; the Griffin appellants shall pay one-half of the costs; and Montgomery County shall pay the other one-half.

[fol. 149]

SUPREME COURT OF THE UNITED STATES

No. 287, October Term, 1961

WILLIAM L. GRIFFIN, *et al.* Petitioners.

vs.

MARYLAND

ORDER ALLOWING CERTIORARI—June 25, 1962

The petition herein for a writ of certiorari to the Court of Appeals of the State of Maryland is granted, and the case is transferred to the summary calendar. The case is set for argument to follow No. 85.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Frankfurter took no part in the consideration or decision of this petition.

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JAMES R. BROWNING, Clerk

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1961 *B*

WILLIAM L. GRIFFIN, MARVOUS SAUNDERS,
MICHAEL PROCTOR, CECIL T. WASHINGTON,
JR., and GWENDOLYN GREENE,

Petitioners,

STATE OF MARYLAND,

Respondent.

**PETITION FOR A WRIT OF CERTIORARI TO THE
COURT OF APPEALS OF MARYLAND**

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1961

No.

WILLIAM L. GRIFFIN, MARVOUS SAUNDERS,
MICHAEL PROCTOR, CECIL T. WASHINGTON,
JR., and GWENDOLYN GREENE, *Petitioners,*

v.

STATE OF MARYLAND,

Respondent.

**PETITION FOR A WRIT OF CERTIORARI TO THE
COURT OF APPEALS OF MARYLAND**

*To the Honorable Chief Justice of the United States and
the Associate Justices of the Supreme Court of the
United States:*

Petitioners pray that a writ of certiorari issue to review
the judgment of the Court of Appeals of Maryland entered
in this case on June 8, 1961.

Opinions Below

The opinions of the Circuit Court for Montgomery
County and of the Court of Appeals of Maryland have not
yet been reported. They are printed in Appendix A, *infra*,
pp. 19 to 29.

Jurisdiction

The judgment of the Court of Appeals of Maryland was entered on June 8, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3), petitioners having asserted below and urging here denial of rights secured by the Fourteenth Amendment to the Constitution.

Question Presented

Whether, consistent with the Fourteenth Amendment, the State of Maryland may utilize powers of police enforcement, arrest, accusation, prosecution and conviction ~~to~~ administer and enforce the racial discrimination of a business advertising and catering to the general public.

Statutes Involved

This case involves Section 1 of the Fourteenth Amendment to the Constitution of the United States, and Article 27, § 577 of the Maryland Code (1957) which provides:

"Any person . . . who shall enter upon or cross over the land, premises or private property of any person . . . after having been duly notified by the owner or his agent not to do so shall be deemed guilty of a misdemeanor . . . provided [however] that nothing in this section shall be construed to include within its provisions the entry or crossing over any land when such entry or crossing is done under a bona fide claim of right or ownership of said land, it being the intention of this section only to prohibit any wanton trespass upon the private land of others."

Statement

The instant case presents unique and important aspects of the legal issues which have arisen from the attempt of Negro citizens to obtain equal treatment with that afforded

to whites in such public accommodations as food, transportation, entertainment and recreation. The sequence of events which gave rise to petitioners' actions culminating in their conviction by the State of Maryland, has its origin in Greensboro, North Carolina, on February 1, 1960. On that day four Negro students at the North Carolina A. & T. College, who had grown increasingly impatient with prevailing practices under which Negro students could not obtain food and refreshment served at local stores, determined to seek service at a local lunch counter in Greensboro. This modest incident marked the beginning of widespread efforts, including those of present petitioners, to open service to Negroes in places of public accommodation. See Pollitt, *Dime Store Demonstrations*, 1960 Duke L. J. 315.

Glen Echo Amusement Park; the major amusement facility serving the District of Columbia and its suburbs, is located in Montgomery County, Maryland and has traditionally been patronized by white customers (Tr. 93-95).¹ On June 30, 1960, a number of persons gathered outside the main entrance of the Park to urge that Negro patrons be permitted to use the Park's facilities and to seek service for Negro patrons by patient, persistent and peaceable efforts to obtain such service (Tr. 110-128). No tickets of admission were required for entry into the Park (R.20) and petitioners, young Negro students participating in the Glen Echo protest, entered the Park through the open main gates at about 8:15 p.m. (R. 15). Having been admitted to the Park without difficulty, petitioners sought to enjoy a merry-go-round ride and took seats on the carousel (R. 16) for which they had in their possession valid tickets of admission (R. 20, Tr. 111).

¹"Tr." references in this Brief indicate the pagination of the official transcript of trial filed as a part of the record in this Court. "R." references indicate pages of the printed record below, nine copies of which have been filed with the Clerk of this Court.

Petitioners were hopeful that the Park would not refuse them the service which it advertised and rendered to the general public (see Tr. 114-116, 125-126). Their attempts at service were not unreasonable, considering that no tickets were required for admission to the Park itself (R. 20), that none of the signs around the Park indicated any discrimination against Negro patrons (Tr. 111), and that in all its press, radio, and television advertising in the District of Columbia area the management invited "the public generally" without distinction of race or color (R. 25-26).

It soon developed, however, that petitioners were not going to be able to ride the carousel on which they had taken their places. Francis J. Collins, employed by the Glen Echo management as a "special policeman" under arrangement with the National Detective Agency (R. 14, 18) and deputized as a Special Deputy Sheriff of Montgomery County on the request of the Park management (R. 18), promptly approached petitioners (R. 16).² He was dressed in the uniform of the National Detective Agency and was wearing the Special Deputy Sheriff's badge representing his state authority (R. 17-18). On the orders of and on behalf of the management (Tr. 104), Deputy Sheriff Collins directed petitioners to leave the Park within five minutes because it was "the policy of the park not to have colored people on the rides, or in the park" (R. 16). Petitioners declined to obey Collins' direction, remaining on the carousel for which they tendered tickets of admission (R. 17, 20).³ Having unsuccessfully directed petitioners to leave

² Collins was head of the private police force at the Park among whom at least two of the employees were deputized as Special Deputy Sheriffs (Tr. 105), pursuant to Montgomery County Code (1955) Sec. 2-91.

³ Friends of the petitioners had purchased these tickets and had given them to petitioners (Tr. 111, 118-119). There is no suggestion that the management placed any restriction upon the transfer of tickets to friends and relatives; indeed, it was conceded by an agent of the Park that transfers frequently occurred in his presence (R. 21). No offer to refund the purchase price was made to petitioners (R. 20).

the premises, under color of his authority as a Special Deputy Sheriff of Montgomery County Collins now arrested petitioners (R. 17, 18) for wantonly trespassing in violation of a Maryland statute (Code, Art. 27, Sec. 577) making it illegal to "enter or cross over" the property of another "after having been duly notified by the owner or his agent not to do so." There was no suggestion that petitioners "were disorderly in any manner" (see p. 23, *infra*). At the subsequent trial, Deputy Sheriff Collins affirmed that he arrested petitioners "because they were negroes," and explained that "I arrested them on orders of Mr. Woronoff [Park Manager], due to the fact that the policy of the park was that they catered just to white people . . ." (R. 19).

At the Montgomery County Police precinct house, where petitioners were taken after their arrest (R. 17), Collins preferred sworn charges for trespass against the petitioners (R. 11, Tr. 41), leading to their trial under the Maryland wanton trespass statute in the Circuit Court for Montgomery County on Sept. 12, 1960. At the trial, Park co-owner Abram Baker candidly described his use of Deputy Sheriff Collins to enforce racial discrimination:

"Q. Would you tell the Court what you told Lieutenant Collins relating to the racial policies of the Glen Echo Park? A. We didn't allow negroes and in his discretion, if anything happened, in any way, he was supposed to arrest them, if they went on our property.

Q. Did you specify to him what he was supposed to arrest them for? A. For trespassing.

Q. You used that word to him? A. Yes; that is right.

Q. And you used the word 'discretion'—what did you mean by that? A. To give them a chance to walk off; if they wanted to.

- Q. Did you instruct Lieutenant Collins to arrest all negroes who came on the property, if they did not leave? A. Yes.
- Q. That was your instructions? A. Yes.
- Q. And did you instruct him to arrest them because they were negroes? A. Yes" (R. 24-25).

Petitioners' constitutional objections to the State's participation in and support of racial discrimination, were repeatedly rejected by the trial court (R. 13-14, 17, 27-30, 32, 33-36). Petitioners were convicted and fined for wanton trespass under the Maryland statute (R. 1-5, p. 19, *infra*). The Maryland Court of Appeals affirmed the convictions, holding the petitioners' refusal to leave the premises upon instructions of management agent Collins, to constitute unlawfully "entering or crossing over" the owners' property, within the meaning of Art. 27, Sec. 577. The Court dismissed the objections under the Fourteenth Amendment and under 42 U.S.C. §§ 1981 and 1982 to State support of racial discrimination by a public commercial enterprise, finding the case to be "one step removed from State enforcement of a policy of segregation" (*infra*, pp. 27-28).

The question thus presented is whether the ruling below can stand, consistent with the equal protection and due process guarantees of the Fourteenth Amendment, in circumstances where the State's direction, to leave, the arrest, the accusation, the prosecution and the criminal conviction supported and enforced discrimination against peaceable Negro patrons by a commercial enterprise advertising and catering to the general public.

Reasons for Granting the Writ

This Case Presents for Review a Compelling Record of State Participation In and Support to "Private" Racial Discrimination and Provides Important Illumination on a Constitutional Issue Presently Pending before the Court

At its present term this Court will review the use of a Louisiana breach of the peace statute in a manner which provided the support of the State to the racially discriminatory practices of businesses catering to the public. See Nos. 26, 27 and 28, *Garner, Briscoe and Houston v. Louisiana*. There are also pending applications for review from Virginia, North Carolina and Maryland involving convictions for "trespass" and "disorderly conduct" of Negroes seeking food, recreation and similar public services at business establishments discriminating against Negro customers. See No. 248, *Randolph v. Virginia*; No. 71, *Drews v. Maryland*; No. 85, *Avent v. North Carolina*. This Court's review is especially warranted in the instant case, for it presents a unique degree of State involvement in and support to racial discrimination against orderly Negro patrons by the largest amusement facility catering to the public in the District of Columbia area. In addition, concurrent review of this proceeding will provide important illumination upon fundamental issues presented in the Louisiana cases and the pending applications for review from Virginia, North Carolina and Maryland.

The premise of the challenge against the criminal proceedings involved in the pending cases is that such manifestations of state power in support of the racially discriminatory practices of enterprises serving the public, constitute "state action" forbidden by the Fourteenth Amendment. What the states have done in all these cases falls well within the area of impermissible state action set forth in this Court's rulings in *Shelley v.*

Kraemer, 334 U.S. 1, *Barrows v. Jackson*, 346 U.S. 249, and *Marsh v. Alabama*, 326 U.S. 501. Indeed, in the instant case there is an even closer interplay between private discrimination and its enforcement by various powers of the State than existed in *Shelley*, *Barrows* and *Marsh*. For here, not only the prosecutory and judicial power of the State have been employed to enforce discrimination, but the State's police authority was handed to the Glen Echo management on a formalized basis for the continuing administration and enforcement of its discriminatory policy. Deputy Sheriff Collins, not upon the request but upon the orders of the private management which employed him, and wearing the badge of his public office, informed and instructed petitioners that because they were Negroes they would have to leave the premises. It was Collins and his associates who were thus administering the Park's policy of racial discrimination on a day to day basis and Collins' direction to the petitioners to leave the premises consummated the unconstitutional involvement of the State in the "private" practice of discrimination.⁴ Then, to add injury to insult, still following the orders of his employers and in his capacity as an officer of the State, Collins arrested petitioners and filed a warrant under oath against them, bringing into play the prosecutorial machinery of the State. The significance of the case at bar is thus found in the fact, directly contrary to the ruling below that State action here was "one step removed from State enforcement of a policy of segregation," that there was absolutely no severance at any time between public and private authority at Glen Echo Park. *What this case adds to those presently before*

⁴ Indeed, Deputy Sheriff Collins "made the crime" of which petitioners were convicted. Collins' direction to leave was a necessary prerequisite of the trespass charge, for petitioners could not have been so charged (and were admittedly lawfully on the premises) until Collins, a state officer, directed them to leave.

the Court is that the Park's policy of racial discrimination was at all times being administered and enforced by the State through Deputy Sheriff Collins and his colleagues. Here the State of Maryland was not merely enforcing the Company's racial discrimination through prosecution in the courts, but was itself administering that discrimination on the premises of the largest public amusement facility in the District of Columbia area. Cf. *Pennsylvania v. Board of Trusts*, 353 U.S. 230.

As this Court recently phrased the presently applicable principle in *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 722, the equal protection clause is invoked when "to some significant extent the state in any of its manifestations has been found to become involved" in private conduct abridging individual rights. The applicability of this rule when the state lends its support to discrimination, through its police powers of direction to leave premises, arrest, accusation, prosecution and conviction, certainly presents an important question for review; this Court characterized the analogous issue presented in *Shelley v. Kraemer* as involving "basic constitutional issues of obvious importance" (334 U. S. at p. 4).

Significantly, the United States as amicus curiae in *Boynton v. Virginia* (No. 7, October Term, 1960) recently urged reversal of a Virginia trespass conviction upon the ground being urged in the pending case, that the Fourteenth Amendment precludes a state's prosecutorial enforcement of racial discrimination by a business catering to the public.⁵ In the Government's Brief before this

⁵ This Court decided the *Boynton* case (364 U.S. 454) on the independent interstate commerce point also urged by the Government. But, for present purposes, it should be emphasized that in the Government's view, invocation of Virginia's criminal trespass authority to support the racially discriminatory policy of the private restaurant there involved, constituted a complete and independent ground for reversal under the Fourteenth Amendment.

Court (at p. 17), the Solicitor General emphasized that "The application of a general, nondiscriminatory, and otherwise valid law to effectuate a racially discriminatory policy of a private agency, and the enforcement of such a discriminatory policy by state governmental organs, has been held repeatedly to be a denial by state action of rights secured by the Fourteenth Amendment." Pertinent judicial rulings, the Brief for the United States suggested demonstrate that "where the state enforces or supports racial discrimination in a place open for the use of the general public . . . it infringes Fourteenth Amendment rights notwithstanding the private origin of the discriminatory conduct" (at p. 20). The Solicitor General concluded that the conviction for "trespass" of a Negro seeking service at a Richmond, Virginia, restaurant constituted unlawful state support to private discrimination, and that

"When a state abets or sanctions discrimination against a colored citizen who seeks to patronize a business establishment open to the general public, the colored citizen is thereby denied the right 'to make and enforce contracts' and 'to purchase personal property' guaranteed by 42 U.S.C. 1981 and 1982 against deprivation on racial grounds" (at p. 28).

Clearly, the pending state prosecutions for "trespass", "breach of peace" and "disorderly conduct", enforcing the racial practices of businesses catering to the general public, offend the mandate of the Fourteenth Amendment under the authoritative rulings of this Court and present an important issue for review.⁶ Yet, the manifest applicability of this Court's rulings against state support to

⁶The State action involved in the instant case not only offends the Constitution but equally transgresses 42 U.S.C. §§ 1981 and 1982. These statutory prohibitions also provide significant and contemporary illumination on the intended scope of the Fourteenth Amendment itself.

private discrimination does not obscure the fact that a number of unresolved questions inhere in the adjudication of the pending constitutional issue. We recognize that the Court will desire carefully to examine certain recurring questions involved in state support to private practices of racial discrimination, and we respectfully suggest that the instant case particularly lends itself to the examination of four of these questions, to which we now turn:⁷

1. *What degree of state participation in private discrimination constitutes "state action" forbidden by the Fourteenth Amendment?*

In its recent *Wilmington Parking Authority* decision, 365 U. S. 715, 722, this Court stated that the Fourteenth Amendment is violated when state support to private discrimination has been given "to some significant extent." This Court will certainly be called upon in the pending cases to determine whether a "significant extent" of state support to discrimination inheres in the arrest, accusation, prosecution and conviction (taken separately or together), of Negro customers peaceably seeking to obtain services provided by business establishments catering to the general public.

We submit that state prosecution and conviction which enforces the racial discrimination of a business proprietor constitutes significant state aid to discrimination in violation of the Fourteenth Amendment.⁸ But in the instant

⁷ A fifth question for this Court's consideration may be whether in this case the highest court of Maryland has construed the Maryland enactment "as authorizing discriminatory classifications based exclusively on color." See concurring opinion of Mr. Justice Stewart in *Burton v. Wilmington Parking Authority*, 365 U.S. 715. While the Maryland statute is neutral on its face, as construed below it requires the conviction of one who, "after having been duly notified by the owner or agent not to do so" because he is a Negro, enters or crosses over his property.

⁸ This, indeed, is the holding of the Third Circuit, one directly contrary to the ruling below, under similar factual circumstances. See *Valle v. Stengel*, 176 F. 2d 697.

case we have far more state action than prosecution and conviction. Here the Deputy Sheriffs were the omnipresent administrators and enforcers of the owners' racial discrimination; here on orders of the private management the officer of the State, wearing his badge as a Deputy Sheriff, demanded that petitioners leave the premises because they were Negroes, thereafter arrested them "because they were Negroes", and filed sworn complaints which initiated the State prosecutions. The entire sequence of events demonstrates Maryland's inextricable and continuous involvement in the administration and enforcement of the racially discriminatory policy of Glen Echo Park.

2. *Is the Fourteenth Amendment transgressed in the absence of a showing that it has been the state's purpose to enforce racial discrimination, when the state's authority has served to administer and enforce such discrimination?*

The court below ruled that the arrest and conviction of petitioners "as a result of the enforcement by the operator of the park of its lawful policy of segregation", could not "fairly be said to be" the action of the State. In so doing, the court below apparently accepted a major contention of the State, that prosecution and conviction is essentially a neutral manifestation of Maryland's general interest in enforcing "property rights," devoid of any racial connotation. This contention does not question that the manifestation of the State's power has the effect of supporting the practice of racial discrimination; rather, it suggests that, unless the State's purpose is to give support to discrimination, the Fourteenth Amendment is not violated.

But discriminatory "motivation" by the state can hardly be the *sine qua non* of the Fourteenth Amendment's applicability when as a matter of fact the exercise of the

state's power supports and abets the practice of racial discrimination. Nowhere in the restrictive covenant decisions or in the recent formulation in *Wilmington Parking Authority* is a motive requirement suggested; recently, in *Gomillion v. Lightfoot*, 364 U.S. 339, this Court rejected a similarly confining motivational interpretation of the Fourteenth Amendment's equality guarantee. Indeed, the very contention that the State is "neutrally" enforcing property rights rather than intending to assist discrimination, was rejected in *Shelley v. Kraemer*, this Court emphasizing that "the power of the State to create and enforce property interests must be exercised within the boundaries defined by the Fourteenth Amendment" (p. 22).

In any event, in the instant case it is clear that not only the effect but the purpose of the State's action has been to give support to Glen Echo's racial policy. The State surrendered its police authority to the use and control of a private corporation for its enforcement of racial discrimination. Armed with police authority, Deputy Sheriff Collins obeyed the orders of his employers in seeking to expel and thereafter in arresting and charging petitioners for trespass. Collins, acting under color of law, had as his sole purpose the administration of discrimination against Negroes. Having put its authority under the orders and control of the Park for its enforcement of racial discrimination, the State cannot now be heard to say that the owners' purpose was not its purpose as well.

3. *To what extent is the resolution of the constitutional issue affected by the consideration that the "property rights" being enforced are those of business establishments catering to the general public rather than homeowners or others seeking personal privacy?*

In *Marsh v. Alabama*, 326 U.S. 501, this Court ruled that the exertion of state criminal authority on behalf of

a proprietor's restriction on the liberties of a member of the general public on his premises was precluded by the Fourteenth Amendment. The Court pointed out (at 505-506): "The State urges in effect that the corporation's right to control the inhabitants of Chickasaw is coextensive with the right of a homeowner to regulate the conduct of his guests. We cannot accept that contention. Ownership does not always mean absolute dominion. *The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it.*" (Emphasis supplied). The *Marsh* case thus highlights the significance attaching to the fact that in the pending case racial discrimination is being enforced by the State on behalf of a public establishment rather than on behalf of individuals, homeowners or associations seeking protection of rights of personal property or privacy. As the Government's brief affirmed with respect to a similar trespass prosecution in last term's *Boynton* case (at p. 20, 22), the Fourteenth Amendment is infringed where the state "enforces or supports racial discrimination in a place open for the use of the general public," for the issue

"is not whether the right, for example, of a homeowner to choose his guests should prevail over petitioner's constitutional right to be free from the state enforcement of a policy of racial discrimination, but rather whether the interest of a proprietor who has opened up his business property for use by the general public—in particular, by passengers travelling in interstate commerce on a federally-regulated carrier—should so prevail."

Glen Echo Amusement Park is a licensed business enterprise owned and operated by corporations chartered by the State of Maryland. It caters to the general public as

the major amusement park in the District of Columbia area and none of its numerous advertisements through various means of public communication reflected any discrimination against Negro members of the public. No tickets of admission were required for entrance to the Park through its open gates, and no signs around the Park proclaimed any restriction upon the custom of Negro patrons. These factors underline the critical consideration in the pending case that the State's power is being invoked to enforce not personal privacy, but rather to assist a business catering to the general public in its refusal of service to Negro members of the public. We suggest that in the disposition of the pending issue, a vital constitutional difference inheres in the distinction between state enforcement of racial discrimination at places of public accommodation, and state protection (where there has been no dedication of the property to the general public) of individual, residential or associational privacy.⁹

4. *What would be the impact of a ruling by this Court that state power may not be invoked to assist business establishments in their discrimination against Negro customers?*

In its *public school desegregation decisions* this Court evidenced its concern with the impact of a constitutional ruling requiring widespread changes in local customs and

⁹ It cannot be too strongly emphasized that there is involved here, not the right of an individual to determine the people he will receive and entertain in his home or private estate, or to select the beneficiaries of his private benevolence. Compare *Pennsylvania v. Board of Trustees*, 357 U.S. 570, with *Pennsylvania v. Board of Trustees*, 353 U.S. 230. The right of the individual to the aid of the state in enforcing his own discriminatory ideas outside his strictly private or personal domain is another matter. And it is here that the Fourteenth Amendment forbids the state to intervene to support racially discriminatory practices. Private corporations cannot invite the general public to patronize their businesses and then call upon the state to exclude members of the public solely because of their race.

practices. In the pending cases this Court will doubtless consider the suggestion that, if denied state enforcement of racial practices, proprietors will widely resort to forcible self-help.¹⁰ On this score, we submit that the public record demonstrates the unlikelihood of any substantial discord or danger attendant upon the removal of state support to the discriminatory practices of enterprises serving the public. It is not the habit of establishments seeking the trade of the public to engage in the unpleasant work of self-help ousters of racial minorities; rather they seek the police to make the ousters for them. The recent abandonment of racial practices by business communities in many Southern localities demonstrates that these practices are not the product of public attitudes or business necessity but only the vestigial remains of former conditions, succored by the willingness of public authorities to enforce the written and unwritten law of segregation.

Prior to February, 1960, lunch counters throughout the South denied normal service to Negroes. Six months later, lunch counters in 69 cities had ended their discriminatory practices (N. Y. Times, Aug. 11, 1960, p. 14, col. 5); by October the number of desegregated municipalities had mounted to more than one hundred (N. Y. Times, Oct. 18, 1960, p. 47, col. 5) and has since continued to increase without apparent incident.

There is more evidence that removal of legal sanctions supporting segregation in public places effectively obviates

¹⁰ As the Supreme Court of North Carolina put the suggestion in *Avent v. North Carolina* (petition pending, No. 85 this Term), if an owner cannot bar Negroes "by judicial process as here, because it is State action, then he has no other alternative but to eject them with a gentle hand if he can, with a strong hand if he must." This contention is not, of course, legally relevant to the constitutional validity of State action in support of discrimination. What we suggest in the text here is that the contention is not only legally irrelevant but factually tenuous. Indeed, in Durham, North Carolina, where *Avent* arose, the dime stores have since quietly abandoned discrimination.

further conflict or difficulty. When state segregation laws were struck down, public libraries in Danville, Virginia and Greenville, South Carolina were closed to avoid desegregation; they reopened a short time later, first on a "stand up only" basis and then on a normal basis, all without incident. Then, too, when public swimming pools were judicially ordered to desegregate, San Antonio, Corpus Christi, Austin, and others integrated without disorder or difficulty. See Pollitt, *The President's Powers in Areas of Race Relations*, 39 N.C.L. Rev. 238, 275. Similarly, Miami Beach, Houston, Dallas and others integrated their public golf courses without incident. Ibid. Again, while the *in terrorem* argument against desegregation was suggested in cases involving pullman cars (*Mitchell v. United States*, 313 U.S. 81), dining cars (*Henderson v. United States*, 339 U.S. 816), buses (*Morgan v. Virginia*, 328 U.S. 373), and air travel and terminal service (*Fitzgerald v. Pan American World Airways*, 229 F. 2d 499; *Nash v. Air Terminal Services*, 85 F. Supp. 545), experience has disproved the predictions of violence.

In the instant case no possible difficulty could arise from this Court's invalidation of State support for segregation at Glen Echo Amusement Park, the Park having abandoned its prior racial practices in March of this year (see *Washington Post*, March 15, 1961, p. 1, col. 2). Unquestionably, an element in the management's abandonment of discrimination was petitioners' challenge to the State's enforcement of that discrimination. The national evidence equally demonstrates that state enforcement of segregation constitutes the last remaining cornerstone for racial practices at places of public service and accommodation.

Conclusion

The instant case, involving prosecutions for trespass, presents in sharp focus constitutional questions related to those the Court has agreed to review in the Louisiana cases, arising from prosecutions for breach of the peace. In a like setting, this Court has indicated the desirability of its concurrent review over cases presenting related aspects of a constitutional question of national importance. *Brown v. Board of Education*, 344 U.S. 1, 3. It is submitted that the grant of certiorari in this case is justified both by the compelling record of Maryland's administration of and support to the "private" practice of racial discrimination, and by the illumination this record furnishes upon material aspects of a pending constitutional issue of nationwide importance.

Respectfully submitted,

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APPENDIX A

Oral Opinion of Trial Court

It is very unfortunate that a case of this nature comes before the criminal court of our State and County. The nature of the case, basically, is very simple. The charge is simple trespass. Simple trespass is defined under Section 577 of Article 27 of the Annotated Laws of Maryland, which states that "any person or persons who shall enter upon or cross over the land, premises, or private property of any person or persons in this State, after having been duly notified by the owner or his agent not to do so shall be deemed guilty of a misdemeanor." Trespass has been defined as an unlawful act, committed without violence, actual or implied, causing injury to the person, property or relative rights of another. This statute also has a provision in it which says that it is the intention of the Legislature as follows: "It is the intention of this section only to prohibit any wanton trespass upon the private land of others." Wanton has been defined in our legal dictionaries as reckless, heedless, malicious; characterized by extreme recklessness, foolhardiness and reckless disregard for the rights or safety of others, or of other consequences.

There have been many trespass cases in Maryland. As a matter of fact, there is one case now pending before the Court of Appeals of Maryland where the racial question has been injected into a disorderly conduct case, and that is the case of "State of Maryland versus Dale H. Drews", decided some few months ago. In that case, Judge Menchine filed a lengthy written opinion, in which he touched upon the rights of a negro to go on private property, whether it is a semi-public or actually a public business, and in that case Judge Menchine said as follows:

"The rights of an owner of property arbitrarily to restrict its use to invitees of his selection is the established law of Maryland." This Court agrees with that opinion, and unless that case is reversed by the Court of Appeals of Maryland, at its session this Fall, that will continue to be the law of Maryland.

That statement by Judge Menchine is based upon authorities of this State, and not too far back, in the case of *Greenfield versus the Maryland Jockey Club*, 190 Md. 96, in which the Court of Appeals of this State said: "The rule that, except in cases of common carriers, inn-keepers and similar public callings, one may choose his customers, is not archaic."

If the Court of Appeals changes its opinion in the 190 Maryland case, then we will have new law in this State on the question of the right of a negro to go on private property after he is told not to do so, or after being on it, he is told to get off.

In this Country, as well as many, many counties in the United States, we have accepted the decision of integration that has been promulgated by the Supreme Court in the school cases, and without and provocation or disputes of any consequence. There is no reason for this Court to change that method of accepting integration, but when you are confronted with a question of whether or not that policy can be extended to private property, we are reaching into the fundamental principles of the foundation of this country.

The Constitution of the United States has many provisions, and one of its most important provisions is that of due process of law. Due process of law applies to the right of ownership of property—that you cannot take that property, or you cannot do anything to interfere with that man's use of his property, without due process of law.

Now, clearly, in this case, which is really a simple case; it is a simple case of a group of negroes, forty in all, getting together in the City of Washington, and coming into Maryland, with the express intent, by the testimony of one of the defense witnesses, that they were going to make a private corporation change its policy of segregation. In other words, they were going to take the law in their own hands. Why they didn't file a civil suit and test out the right of the Glen Echo Park Amusement Company to follow that policy is very difficult for this Court to understand, yet they chose to expose themselves to possible harm; to possible riots and to a breach of the peace. To be ex-

posed to the possibility of a riot in a place of business, merely because these defendants want to impress upon that business their right to use it, regardless of the policy of the corporation, should not be tolerated by the Courts. Unless the law of this State is changed, by the Court of Appeals of Maryland, this Court will follow the law that has already been adopted by it, that a man's property is his castle, whether it be offered to the public generally, or only to those he desires to serve.

There have been times in the past, not too many years back, when an incident of this kind would have caused a great deal of trouble. It could have caused race riots, and could have caused bloodshed, but now the Supreme Court, in the school case in 1954, has decided that public schools must be integrated, and the people of this County have accepted that decision. They have not quibbled about it; They have gone along with it without incident. We are one of the leading counties in the United States in accepting that decision. If the Court of Appeals of Maryland decides that a negro has the same right to use private property as was decided in the school cases, as to State or Government property, or if the Supreme Court of the United States so decides, you will find that the places of business in this County will accept that decision, in the same manner, and in the same way that public authorities and the people of the County did in the School Board decision, but there is nothing before this Court at this time except a simple case of criminal trespass. The evidence shows the defendants have trespassed upon this Corporation's property, not by being told not to come on it, but after being on the property they were told to get off.

Now it would be a ridiculous thing for this Court to say that when an individual comes on private property, and after being on it, either sitting on it or standing on it, and the owner comes up and says, "Get off my property", and then the party says "You didn't tell me to get off the property before I came on it, and, therefore, you cannot tell me to get off now" he is not guilty of trespass because he was not told to stay off of the property. It is a wanton trespass when he refuses to get off the property, after being told to get off.

One of the definitions of wanton is "foolhardy" and this surely was a foolhardy expedition; there is no question about that. When forty people get together and come out there, as they did, serious trouble could start. It is a simple case of trespass. It is not a breach of the peace, or a case of rioting, but it could very easily have been, and we can thank the Lord that nothing did take place of such a serious nature.

It is not up to the Court to tell the Glen Echo Amusement Company what policies they should follow. If they violate the law, and are found guilty, this Court will sentence them.

It is most unfortunate that this matter comes before the Court in a criminal proceeding. It should have been brought in an orderly fashion, like the School Board case was brought, to find out whether or not, civilly, the Glen Echo Park Amusement Company would follow a policy of segregation, and then you will get a decision based on the rights of the property owner, as well as the rights of these defendants. So, the Court is very sorry that this case has been brought here in our courts.

It is my opinion that the law of trespass has been violated, and the Court finds all five defendants guilty as charged.

Opinion of Court of Appeals of Maryland

This is a consolidated appeal from ten judgments and sentences to pay fines of one hundred dollars each, entered by the Circuit Court for Montgomery County after separate trials, each involving five defendants, on warrants issued for wanton trespass upon private property in violation of Code (1957), Art. 27, § 577.

The first group of defendants, William L. Griffin, Marvous Saunders, Michael Proctor, Cecil T. Washington, Jr., and Gwendolyn Greene (hereinafter called "the Griffin appellants" or "the Griffins"), all of whom are Negroes, were arrested and charged with criminal trespass on June 30, 1960, on property owned by Rekab, Inc., and operated by Kebar, Inc., as the Glen Echo Amusement Park (Glen Echo or park). The second group of defend-

ants, Cornelia A. Greene, Helene D. Wilson, Martin A. Schain, Ronyl J. Stewart and Janet A. Lewis (hereinafter called "the Greene appellants" or "the Greenes"), two of whom are Caucasians, were arrested on July 2, 1960, also in Glen Echo, and were also charged with criminal trespass.

The Griffins were a part of a group of thirty-five to forty young colored students who gathered at the entrance to Glen Echo to protest "the segregation policy that we thought might exist out there." The students were equipped with signs indicating their disapproval of the admission policy of the park operator, and a picket line was formed to further implement the protest. After about an hour of picketing, the five Griffins left the larger group, entered the park and crossed over it to the carrousel. These appellants had tickets (previously purchased for them by a white person) which the park attendant refused to honor. At the time of this incident, Rekar and Kebar had a "protection" contract with the National Detective Agency (agency), one of whose employees, Lt. Francis J. Collins (park officer), who is also a special deputy sheriff for Montgomery County, told the Griffins that they were not welcome in the park and asked them to leave. They refused, and after an interval during which the park officer conferred with Leonard Woronoff (park manager), the appellants were advised by the park officer that they were under arrest. They were taken to an office on the park grounds and then to Bethesda, where the trespass warrants were sworn out. At the time the arrests were made, the park officer had on the uniform of the agency, and he testified that he arrested the appellants under the established policy of Kebar of not allowing Negroes in the park. There was no testimony to indicate that any of the Griffins were disorderly in any manner, and it seems to be conceded that the park officer gave them ample time to heed the warning to leave the park had they wanted to do so.

The Greene appellants entered the park three days after the first incident and crossed over it and into a restaurant operated by the B & B Industrial Catering Service, Inc., under an agreement between Kebar and B & B. These

appellants asked for service at the counter, were refused, and were advised by the park officer that they were not welcome and were ordered to leave. They refused to comply by turning their backs on him and he placed them under arrest for trespassing. Abram Baker (president of both Rekab and Kebab) testified that it was the policy of the park owner and operator to exclude Negroes and that the park officer had been instructed to ask Negro customers to leave, and that if they did not, the officer had orders to arrest them. There was no evidence to show that the operator of the restaurant had told the Greenes they were not welcome or to leave; nor was there any evidence that the park officer was an agent of the restaurant operator. And while a prior formal agreement covering the 1957 and 1958 seasons had provided that the restaurant operator was subject to and should comply with the rules and regulations concerning the persons to be admitted to the park and that Kebab had reserved the right to enforce them, the letter confirming the agreement for the 1959 and 1960 seasons fixed the rentals for that period and alluded to other matters, but made no reference whatsoever, either directly or indirectly, to the prior formal agreement—though there was testimony, admitted over objection, to the effect that the letter was intended as a renewal of the prior lease—and was silent as to a reservation by Kebab of the right to police the restaurant premises during the 1959 and 1960 seasons.

On this set of facts, both groups of appellants make the same contentions on this appeal: (i) that the requirements for conviction under Art. 27, § 577, were not met; and (ii) that the arrest and conviction of the appellants constituted an exercise of the power of the State of Maryland in enforcing a policy of racial segregation in violation of the Fourteenth Amendment to the Constitution of the United States.

¹ The document was called an "agreement"; the operator of the restaurant was referred to therein as a "concessionaire" and was described in the agreement as a "licensee" and not a "lessee"; yet the agreement called for the payment of rent (payable bi-annually) as well as for a portion of the gross receipts and a part of the county licensing fees and certain other items of expense.

Trespass to private property is not a crime at common law unless it is accompanied by, or tends to create, a breach of the peace. See *Krauss v. State*, 216 Md. 369, 140 A. 2d 653 (1958), and the authorities therein cited. And it was not until the enactment of § 21A of Art. 27 (as a part of the Code of 1888) by Chapter 66 of the Acts of 1900 that a "wilful trespass" (see *House Journal* for 1900, p. 322) upon private property was made a misdemeanor. That statute, which has remained unchanged in phraseology since it was originally enacted, is now § 577 of Art. 27 (in the Code of 1957), entitled "wanton trespass upon private land," and reads in pertinent part:

"Any person * * * who shall enter upon or cross over the land, premises or private property of any person * * * after having been duly notified by the owner or his agent not to do so shall be deemed guilty of a misdemeanor * * *; provided [however] that nothing in this section shall be construed to include * * * the entry or crossing over any land when such entry or crossing is done under a bona fide claim of right or ownership * * *, it being the intention of this section only to prohibit any wanton trespass upon the private land of others."

The Case Against the Griffin Appellants

(i)

The claim that the requirements for conviction were not met is threefold: (a) that due notice not to enter upon or cross over the land in question was not given to the appellants by the owner or its agent; (b) that the action of the appellants in doing what they did was not wanton within the meaning of the statute; and (c) that what the appellants did was done under a bona fide claim of right.

There was due notice so far as the Griffins were concerned. Since there was evidence that these appellants had gathered at the entrance of Glen Echo to protest the segregation policy they thought existed there, it would not be unreasonable to infer that they had received actual notice not to trespass on the park premises even though it had not been given by the operator of the park or its agent. But:

even if we assume that the Griffins had not previously had the notice contemplated by the statute which was required to make their entry and crossing unlawful, the record is clear that after they had seated themselves on the carousel, these appellants were not only told they were unwelcome, but were then and there clearly notified by the agent of the operator of the park to leave and deliberately chose to stay. That notice was *due* notice to these appellants to depart from the park premises forthwith, and their refusal to do so when requested constituted an unlawful trespass under the statute. Having been duly notified to leave, these appellants had no right to remain on the premises and their refusal to withdraw was a clear violation of the statute under the circumstances even though the original entry and crossing over the premises had not been unlawful. *State v. Fox*, 118 S.E.2d 58 (N.C. 1961). Cf. *Commonwealth v. Richardson*, 48 N.E.2d 678 (Mass. 1943). Words such as "enter upon" or "cross over" as used in § 577, *supra*, have been held to be synonymous with the word "trespass." See *State v. Avent*, 118 S.E.2d 47 (N.C. 1961).

The trespass was wanton within the meaning of the statute. Since the evidence supports a reasonable inference that the Griffins entered the park premises and crossed over it well knowing that they were violating the property rights of another, their conduct in so doing was clearly wanton. Although there are almost as many legal definitions of the word "wanton" as there are appellate courts, we think the Maryland definition, which is in line with the general definition of the word in other jurisdictions, is as good as any. In *Dennis v. Baltimore Transit Co.*, 189 Md. 610, 56 A.2d 813 (1948), as well as in *Baltimore Transit Co. v. Faulkner*, 179 Md. 598, 20 A.2d 485 (1941), it was said that the word "wanton" means "characterized by extreme recklessness and utter disregard for the rights of others." We see no reason why the refusal of these appellants to leave the premises after having been requested to do so was not wanton in that their conduct was in "utter disregard of the rights of others." Even though their remaining may have been no more than an aggravating

incident, it was nevertheless wanton within the meaning of this criminal trespass statute. See *Ex Parte Birmingham Realty Co.*, 63 So. 67 (Ala. 1913).

Since it was admitted that the carrousel tickets were obtained surreptitiously in an attempt to "integrate" the amusement park, we think the claim that these appellants had taken seats on the carrousel under a bona fide claim of right is without merit. While the statute specifically excludes the "entry upon or crossing over" privately owned property by a person having a license or permission to do so, these appellants do not come within the statutory exception. In a case such as this where the operator of the amusement park—who had a right to contract only with those persons it chose to deal with—had not knowingly sold carrousel tickets to these appellants, it is apparent that they had no bona fide claim of right to a ride thereon, and, absent a valid right, the refusal to accept the tickets was not a violation of any legal right of these appellants.

(ii)

We come now to the consideration of the second contention of the Griffin appellants that their arrest, and conviction constituted an unconstitutional exercise of state power to enforce racial segregation. We do not agree. It is true, of course, that the park officer—in addition to being an employee of the detective agency then under contract to protect and enforce, among other things, the lawful racial segregation policy of the operator of the amusement park—was also a special deputy sheriff, but that dual capacity did not alter his status as an agent or employee of the operator of the park. As a special deputy sheriff, though he was appointed by the county sheriff on the application of the operator of the park "for duty in connection with the property" of such operator, he was paid wholly by the person on whose account the appointment was made and his power and authority as a special deputy was limited to the area of the amusement park. See *Montgomery County Code* (1955), § 2-91. As we see it, our decision in *Dreus v. State*, 224 Md. 186, 167 A.2d 341 (1961), is controlling here. The appellants in that case—in the course

of participating in a protest against the racial segregation policy of the owner of an amusement park—were arrested for disorderly conduct committed in the presence of regular Baltimore County police who had been called to eject them from the park. Under similar circumstances, the appellants in this case—in the progress of an invasion of another amusement park as a protest against the lawful segregation policy of the operator of the park—were arrested for criminal trespass committed in the presence of a special deputy sheriff of Montgomery County (who was also the agent of the park operator) after they had been duly notified to leave but refused to do so. It follows—since the offense for which these appellants were arrested was a misdemeanor committed in the presence of the park officer who had a right to arrest them, either in his private capacity as an agent or employee of the operator of the park or in his limited capacity as a special deputy sheriff in the amusement park (see Kauffman, *The Law of Arrest in Maryland*, 5 Md L. Rev. 125, 149)—the arrest of these appellants for a criminal trespass in this manner was no more than if a regular police officer had been called upon to make the arrest for a crime committed in his presence, as was done in the *Drews* case. As we see it, the arrest and conviction of these appellants for a criminal trespass as a result of the enforcement by the operator of the park of its lawful policy of segregation, did not constitute such action as may fairly be said to be that of the State. The action in this case, as in *Drews*, was also “one step removed from State enforcement of a policy of segregation and violated no constitutional right of appellants.”

The judgments as to the Griffin appellants will be affirmed.

The Case Against the Greene Appellants

There is not enough in the record to show that the Greenes were duly notified to leave the restaurant by the only persons who were authorized by the statute to give notice. The record discloses that these appellants entered the park and crossed over it into the restaurant on the premises, but there was no evidence that the operator or

lessee of the restaurant or an agent of his either advised these appellants that they were unwelcome or warned them to leave. There was evidence that the park officer had ordered these appellants to leave, but it is not shown that he was authorized to do so by the lessee, and a new written agreement for the 1959 and 1960 seasons having been substituted for the former agreement covering the 1957 and 1958 seasons, the state of the record is such that it is not clear that the lessor had reserved the right to continue policing the leased premises as had been the case during the 1957-1958 period. Under these circumstances, it appears that the notice given by the park officer was ineffective. There is little doubt that these appellants must have known of the racial segregation policy of the operator of the park and that they were not welcome anywhere therein, but where notice for a definite purpose is required, as was the case here, knowledge is not an acceptable notice where the required notification is incident to the infliction of a criminal penalty. 1 Merrill, *Notice*, § 509. See also *Woodruff v. State*, 54 So. 240 (Ala. 1911), where it was held (at p. 240) that "[i]n order to constitute the offense of trespass after warning, it is necessary to show that the warning was given by the person in possession or his duly authorized agent." And see *Payne v. State*, 12 S.W.2d 528 (Tenn. 1928), [a court cannot convict a person of a crime upon notice different from that expressly provided in the statute]. Since the notice to the Greene appellants was inadequate they should not have been convicted of trespassing on private property, and the judgments as to them must be reversed.

THE JUDGMENTS AGAINST THE GRIFFIN APPELLANTS ARE AFFIRMED; THE JUDGMENTS AGAINST THE GREENE APPELLANTS ARE REVERSED; THE GRIFFIN APPELLANTS SHALL PAY ONE-HALF OF THE COSTS; AND MONTGOMERY COUNTY SHALL PAY THE OTHER ONE-HALF.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1960 ⁶³

No. ~~63-10000~~ ⁶

**WILLIAM L. GRIFFIN, MARVOUS SAUNDERS,
MICHAEL PROCTOR, CECIL T. WASHINGTON,
JR., AND GWENDOLYNE GREENE,**

Petitioners,

v.

STATE OF MARYLAND,

Respondent.

**ON PETITION FOR WRIT OF CERTIORARI TO THE
COURT OF APPEALS OF MARYLAND**

BRIEF IN OPPOSITION

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For Respondent.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1961

No. 287

**WILLIAM L. GRIFFIN, MARVOUS SAUNDERS,
MICHAEL PROCTOR, CECIL T. WASHINGTON,
JR., AND GWENDOLYNE GREENE,**

Petitioners,

v.

STATE OF MARYLAND,

Respondent.

**ON PETITION FOR WRIT OF CERTIORARI TO THE
COURT OF APPEALS OF MARYLAND**

BRIEF IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals of Maryland is fully set out on pages 22 through 29 of the Appendix to the Petition for Writ of Certiorari (hereinafter referred to as "A") and is now reported in the Advance Sheets, 225 Md. 422 and 171 A. 2d 717.

JURISDICTION

The judgment of the Court of Appeals of Maryland was entered on June 8, 1961. The Respondent denies that 28 U.S.C.A. Section 1257(3) or Revised Rule 19 of this Honorable Court provides jurisdiction for consideration of the instant Petition for Writ of Certiorari.

QUESTION PRESENTED

The Respondent accepts the substance of the Petitioners' question but submits that it should be rephrased, to delete characterizations and conclusions, as follows:

May the State of Maryland, under a general statute prohibiting trespass on private property and on the complaint of the owner of a privately-owned and operated amusement park, convict persons who picket and enter upon such amusement park and who, after demand by the agent of the owner, refuse to leave such amusement park?

STATEMENT

This is a Petition for Writ of Certiorari to review the judgment of the Court of Appeals of Maryland affirming the conviction of the Petitioners for violation of the general statute prohibiting trespass on private property.

The Court of Appeals affirmed the conviction of these five Petitioners and reversed the conviction of five other persons in a companion case. The Court of Appeals distinguished between the two cases on the basis that these Petitioners had been duly notified by the agent of the owner to leave the private amusement park, whereas in the companion case the authority of the guard giving the notice was not established. Although the same guard gave the notice in both cases, the evidence in the companion case did not clearly establish that the guard was acting

on behalf of the concessionaire who operated the restaurant in the amusement park.

These Petitioners were a part of a group of about forty people who left the District of Columbia and entered the State of Maryland on June 30, 1960. The group proceeded to the area of the privately-owned amusement park for the purpose of protesting the park's known policy of admitting to the premises and providing service to white people only. See Appendix hereto (hereinafter referred to as "Apx."), pages 4 and 5. The group, including these five Petitioners, staged a picket line for an hour near the entrance to the amusement park, displaying prepared signs and placards which protested racial segregation (Apx. 5). After surreptitiously receiving tickets for amusements within the park (Apx. 4, 5), these five Petitioners left the picket line and entered the private property of the amusement park, placed themselves upon the carousel and refused to leave the premises when requested to do so by the park's agent (Apx. 2).

The park's agent at the time was Lieutenant Collins, who was an employee of the National Detective Agency, a private organization authorized to provide guard service to its clients. Under the State law such guards do not have police power. The public local laws authorized the particular county to deputize agents of the owners of private property and businesses for the purpose of permitting them to obtain police protection without cost to the taxpayers generally. Such special deputies are restricted in their authority to the premises of the applicant and do not have the county-wide authority of a regular deputy sheriff. Lieutenant Collins had been assigned under the guard contract between the National Detective Agency and the amusement park to be the senior guard with the title of lieutenant.

Lieutenant Collins wore the uniform of the National Detective Agency, his employer, and as guard on the private amusement park property, he was to execute the orders of the owner and operator as its agent. Under the instructions of the owner and operator, he arrested the Petitioners because they were trespassers (Apx. 3). The trespass incident caused a milling crowd to become disorderly (Apx. 2, 5).

In the companion case, which was reversed by the Court of Appeals of Maryland, two of the arrestees were white.

This is one of several actions, involving claims of civil rights against private property, which have been developed through the criminal and appellate courts of the states to be pressed upon the attention of this Honorable Court. Compare Respondent's *Motion to Dismiss or Affirm* in *Dale H. Drews v. State of Maryland*, No. 71, October Term, 1961.

ARGUMENT

This Petition Does Not Present Any Unique Factual Situation Nor Any Legal Proposition Which Has Not Been Fairly Included in Cases Recently Before This Honorable Court.

The proposition tendered by the Petitioners is essentially the same as the one presented originally in *Boynton v. Virginia*, 364 U.S. 454. The Petitioners in the *Boynton* case and the Solicitor General, by a brief *amicus curiae*, urged this Honorable Court to consider the same proposition which is again being tendered by these Petitioners, but this Honorable Court, in its wisdom, decided the case on another basis. Undoubtedly, this Honorable Court was following the concept contained in the last sentence in the recent dissent by Mr. Justice Harlan in *Burton v. Wilmington Parking Authority*, 365 U.S. 715.

"It seems to me both unnecessary and unwise to reach issues of such broad constitutional significance as those now decided by the Court, before the necessity for deciding them has become apparent."

Evidently, counsel for the Petitioners is not satisfied with the position taken by this Honorable Court in the *Boynton* case, since he quotes and urges again the arguments of the Solicitor General which this Honorable Court had previously considered and rejected.

The Petitioners refer to other applications for certiorari currently pending before this Honorable Court from Virginia, North Carolina and Louisiana. This curious condition tends to indicate that there is a concerted determination that this Honorable Court must continually be presented for decision each term the fringe questions in the field of civil rights and be vigorously pressed forward each year into new areas even prematurely. There has been no lack of opportunity in the last several years for this Honorable Court, if it had seen fit, to consider the question urged by the Petitioners. Compare *Wolfe v. North Carolina*, 364 U.S. 177; *Boynton v. United States*, 364 U.S. 454, *supra*; and *Burton v. Wilmington Parking Authority*, 365 U.S. 715, *supra*. The sudden appearance of many criminal cases involving claims of discrimination in the last several years is not consistent with normal coincidence. Compare *United States v. United Mine Workers of America*, 330 U.S. 258. It is pertinent to observe the comment of the trial Judge below in his oral opinion (A. 20):

"Why they didn't file a civil suit and test out the right of the Glen Echo Amusement Park Company to follow that policy is very difficult for this Court to understand, yet they chose to expose themselves to possible harm; to possible riots and to a breach of the peace."

To grant certiorari to these Petitioners, and perhaps to the petitioners in the other cases referred to by these Petitioners, is to encourage public violence and the use of the criminal law rather than the civil law for the location and determination of the extent of particular civil rights. The civil law should not be evolved in the criminal courts of the nation, and the creation of artificial crises should not be encouraged.

The Petitioners, in order to supply an air of uniqueness to their position, have somewhat distorted the evidence in the case in the trial court. The Petitioners continually refer to the private detective agency guard as "Deputy Sheriff Collins", whereas everyone in the trial court recognized his true status by referring to him as "Lieutenant". There is *nothing* in the record to support the assertion that Collins was hired by the amusement park for the sole purpose of excluding Negroes. The usual reason an owner or businessman engages uniformed guards is to maintain peace and to protect property from damage or theft. There is nothing in the record to indicate that Collins was hired for any other reason.

The Petitioners have conveniently overlooked the fact that the Court of Appeals reversed the companion case against *Greene* and others where the same guard gave the same instruction to leave the restaurant in the amusement park but where there was a failure in the record to clearly establish that Collins had the concessionaire's authority as private owner to give such a notice. The opinion of the Court of Appeals clearly indicates that Collins was not executing any State authority by virtue of his special deputy sheriff's commission but was acting solely as the agent of the private property owner in directing the Petitioners to leave the private amusement park premises. It will be noted that although Lieutenant Collins arrested

the Petitioners, nevertheless he went through the same procedure as any ordinary citizen in obtaining an arrest warrant from a justice of the peace for Montgomery County directed to the county superintendent of police (Record Extract, page 11).

It is difficult to reconcile the characterization that the private amusement park was open to the general public with the fact that these Petitioners admittedly believed the park to be restricted to white people, actually protested the supposed segregation policy by picketing prior to entry, surreptitiously obtained carousel tickets through white people and concede in their instant petition that the amusement park "has traditionally been patronized by white customers" on page 3.

The thrust of the Petitioners' argument is that the right of the owner of a private business to determine who his customers will be is lost whenever this discretion is based on his disinclination to serve a particular racial group and that the ordinary trespass law, which insures peaceful possession, is nugatory when the owner's motivation is based on race. The Petitioners seek to strip the private property owner of his right to determine his invitees and to relegate such owner to violent self-help, when the members of a race with whom he is not inclined to do business take the law into their own hands and trespass on his private property. Although the Petitioners have taken liberties with the record and have enjoyed excursions into the hearsay of newspapers, which were not admitted into evidence below, to theorize on the impact which the destruction of long-established private property law concepts might produce, nevertheless, the Petitioners have not indicated whether they should be entitled to have the State defend them while trespassing if the private owner should resort to violent self-help. A petition for a writ

of certiorari should be addressed to the law as it is and not to speculative theorizing as to what the law could be based on hearsay.

The Petitioners were not satisfied to raise their legal theories concerning the rights of a private property owner by a deliberative civil proceeding but took the law into their own hands and forced the issue into the criminal courts. The Petitioners refer to their trespass as *peaceable* but it is difficult to reconcile an invasion of another's private property against his known wish with the use of that word.

The Petitioners have referred to other cases which this Honorable Court has considered. In pertinent cases there has been a public ownership element. It was either a public school, a public recreational facility or a publicly-owned utility. The taxpayers, through the State or municipality, either owned or operated it or they profited from a lessee thereof. The public ownership element has been present in every case, from *Brown v. Board of Education of Topeka*, 344 U.S. 1 and 347 U.S. 483 to and including *Burton v. Wilmington Parking Authority*, 365 U.S. 715, *supra*. In the only case which involved private ownership this Honorable Court decided to consider the matter from a federal statutory aspect. *Boynton v. Virginia*, 364 U.S. 454, *supra*.

The common law has been well settled that the owner or operator of a private enterprise has the right to select his clientele and to make such selection based on color if he so desires. A few of the noteworthy case are: *Madden v. Queens County Jockey Club*, 72 N.E. 2d 697, 698 (New York); *Terrell Wells Swimming Pool v. Rodriguez*, 182 S.W. 2d 824, 825 (Texas); *Younger v. Judah*, 19 S.W. 1109, 1111 (Missouri); *Goff v. Savage*, 210 P. 374 (Washington);

De La Ysla v. Public Theatres Corporation, 26 P. 2d 818, 820 (Utah); *Horn v. Illinois Central Railroad*, 64 N.E. 2d 574, 578 (Illinois); *Coleman v. Middlestaff*, 305 P. 2d 1020, 1022 (California); *Fletcher v. Coney Island*, 136 N.E. 2d 344, 350 (Ohio); *Alpaugh v. Wolverton*, 36 S.E. 2d 906, 908 (Virginia); *Greenfeld v. Maryland Jockey Club*, 190 Md. 96, 102; *Good Citizens Assoc. v. Board*, 217 Md. 129, 131; *Drews v. State*, 224 Md. 186, 191, 193, 194; *Slack v. Atlantic White Tower System, Inc.*, 181 F. Supp. 124, 127; and *Williams v. Howard Johnson's Restaurant*, 268 F. 2d 845 (4th Circuit).

This Court has used language consistent in *Terminal Taxicab Co. v. Kutz*; 241 U.S. 252, 256, and *Boynton v. Virginia*, 364 U.S. 454, *supra*, where it stated that:

"We are not holding that every time a bus stops at a wholly independent roadside restaurant the Interstate Commerce Act requires that restaurant service be supplied in harmony with the provision of that Act."

The Petitioners are in the anomalous position of recognizing that the Congress of the United States cannot enact a federal equal rights statute under the Fourteenth Amendment (Civil Rights Cases, 109 U.S. 3), nevertheless asserting that this Honorable Court by judicial decision can accomplish the same result by now holding that the same Fourteenth Amendment created a new limitation on the use of private property as developed in the common law. For this proposition the Petitioners cite no authority.

CONCLUSION

The Petitioners' essential proposition is that a person cannot be convicted of trespass if the private owner's exclusion is based on racial discrimination. This same proposition was presented and urged by the Solicitor General

in the *Boynton* case, but this Honorable Court declined to decide the *Boynton* case on that issue. The same proposition has been available to the Court in several other recent cases. There is nothing new or unique about the Petitioners' proposition. This petition is addressed to a desire for legislative relief rather than support in existing law and is another phase of the concerted action to press for an immediate determination of a new front in the civil rights crusade.

The contention that violent self-help is the only remedy available to a private property owner or that the aggressive trespasser alone can receive State aid to preserve his asserted right presents little logic to a jurisprudence based on reconciling conflicting rights and developing peaceful remedies.

This petition for a writ of certiorari is premature, as an abstract proposition and this Honorable Court has consistently recognized that the essence of this complaint does not involve a substantial federal question. This petition should be denied.

Respectfully submitted,

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For Respondent.

APPENDIX TO BRIEF IN OPPOSITION NO. 287

September 12, 1960

Vol. 1

(Transcript of testimony 6-7):

FRANCIS J. COLLINS, a witness of lawful age, called for examination by counsel for the plaintiff, and having first been duly sworn, according to law, was examined and testified as follows, upon

DIRECT EXAMINATION

By Mr. McAuliffe:

* * * * *

(T. 18):

Q. During the five minute period that you testified to after you warned each of the five defendants to leave the park premises, what, if anything, did you do? A. I went to each defendant and told them that the time was up and that they were under arrest for trespassing. I then escorted them up to our office, with a crowd milling around there, to wait for transportation from the Montgomery County Police, to take them to Bethesda to swear out the warrants.

* * * * *

(T. 21):

CROSS EXAMINATION

By Mr. Duncan:

* * * * *

(T. 38-39):

Q. Lets take Mr. Washington, here on the end. Tell me the conversation you had with him at the time you arrested him and what he said to you. A. As far as I recall there was no conversation between any of us, only I told them

APX. 2

about the policy of the park and they answered me that they weren't going to leave the park.

* * * * *

(T. 42):

REDIRECT EXAMINATION

By Mr. McAuliffe:

* * * * *

(T. 48-49):

By Judge Pugh:

Q. Did these defendants have any other people with them? A. There was a large crowd around them from the carousel up to the office.

Mr. McAuliffe continues:

Q. And prior to the arrest, during this five minute interval that you gave them as a warning period, was there a crowd gathering at that time? A. Yes, sir.

Q. And what was the condition, or orderliness, of that crowd as it gathered there?

(Mr. Duncan) I object to that question, your Honor. Mr. Collins has testified that he arrested these persons for no other reason than that they were negroes, and gave them five minutes to get off the property.

Q. (Judge Pugh) Was there any disorder? A. It started a disorder because people started to heckling.

* * * * *

(T. 67):

ABRAM BAKER, a witness of lawful age, called for examination by counsel for the plaintiff, and having first been duly sworn, according to law, was examined and testified, upon

* * * * *

(T. 76):

CROSS EXAMINATION

By Mr. Duncan:

* * * * *

(T. 85):

Q. What did you mean when you told Lieutenant Collins to arrest white persons who came into the park property, if they were doing something wrong?

(Mr. McAuliffe) Objection.

(Judge Pugh) Read the question back. (Last question was read by the reporter.) Objection overruled.

A. Well if they were in the picket line and then ran out into the park and we told them to leave and they refused, why shouldn't you arrest them?

* * * * *

(T. 96):

REDIRECT EXAMINATION

By Mr. McAuliffe:

* * * * *

(T. 97):

Q. Did you instruct Lieutenant Collins that he was to arrest negroes because they were negroes, or because they were trespassing? A. Because they were trespassing.

* * * * *

(T. 98):

RECROSS EXAMINATION

By Mr. Duncan:

Q. Did you instruct Lieutenant Collins to arrest any other persons who trespassed, other than negroes? A. I went over that once before with you. I told him if they came out of that picket line to come on to the property, to give them due notice and to arrest them if they didn't leave white or colored.

* * * * *

(T. 110):

KAY FREEMAN,

a witness of lawful age, called for examination by counsel for the defendants, and having first been duly sworn, according to law, was examined and testified as follows, upon

DIRECT EXAMINATION

By Mr. Duncan:

* * * * *

Q. Prior to the time they were arrested, did they have tickets to ride on any of the rides? A. We all had tickets.

Q. Where did you acquire these tickets? A. They were given to us by friends.

Q. White friends? A. Yes.

Q. And they had made the purchase? A. That is right.

* * * * *

(T. 113):

CROSS EXAMINATION

By Mr. McAuliffe:

* * * * *

(T. 114-115):

Q. Did you go out with these five defendants? A. Yes.

Q. Did you go out with any others? A. Yes.

Q. How many? A. Thirty-five or forty.

Q. And you all expected to use the facilities there at Glen Echo Park, in accordance with those advertisements? A. I expected to use them.

Q. Did you have any signs with you when you went out there? A. Yes.

Q. What did these signs say? A. They protested the segregation policy that we thought might exist out there.

* * * * *

Q. Did these five defendants have signs? A. I don't know. I think we all had signs, at one time or another.

(T. 116):

Q. What did these five defendants do and other persons do? A. We had a picket line.

Q. Why did you do that if you didn't know the park was segregated? A. Because we thought it was segregated.

(T. 118):

Q. Now you say after you got on the park property, tickets were given you by some white friends; is that right? A. That is right.

(T. 120):

Q. Was there a crowd around there? A. Yes.

Q. Did you hear any heckling? A. Yes.

(T. 123):

Q. How long did you march in this definite circle, with these five defendants, with these signs, protesting the park's segregation policy, before the five defendants and you entered Glen Echo Park? A. I don't know.

Q. Would you give us your best estimate on that, please? A. Maybe an hour or maybe longer.

(T. 125):

EXAMINATION BY THE COURT

By Judge Pugh:

Q. Was the heckling a loud noise? A. Yes.

Q. How many people were in it? A. I don't know, but the merry-go-round was almost surrounded.

APX. 6

(T. 126):

Q. Why didn't you go with one or two people, instead of forty? What was the idea of going out there in large numbers? A. There was a possibility that it was segregated.

Q. Well you all anticipated that there would be some trouble; didn't you? A. Yes.

* * * * *

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

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No. ~~2~~ 6

WILLIAM L. GRIFFIN, ET AL.,

Petitioners,

vs.

MARYLAND,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE
OF MARYLAND

BRIEF FOR PETITIONERS

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

No. 26

WILLIAM L. GRIFFIN, ET AL.,

Petitioners,

vs.

MARYLAND,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE
OF MARYLAND

BRIEF FOR PETITIONERS

Opinions Below

The opinions of the Circuit Court for Montgomery County and of the Court of Appeals of Maryland (225 Md. 422, 171 A. 2d 717) appear at R. 72 and R. 76.

Jurisdiction

The judgment of the Court of Appeals of the State of Maryland was entered on June 8, 1961. The petition for a writ of certiorari was filed on August 4, 1961 and was granted on June 25, 1962 (R. 84). The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

Question Presented

Whether, consistent with the Fourteenth Amendment, the State of Maryland may utilize its police powers of enforcement, arrest, accusation, and prosecution and its judicial powers of trial and conviction, to administer and effectuate racial discrimination at a licensed accommodation which caters to the general public.

Statutes Involved

This case involves Section 1 of the Fourteenth Amendment to the Constitution of the United States, and Article 27, Sec. 577 of the Maryland Code (1957) which provides:

"Any person . . . who shall enter upon or cross over the land, premises or private property of any person . . . after having been duly notified by the owner or his agent not to do so shall be deemed guilty of a misdemeanor . . . provided [however] that nothing in this section shall be construed to include within its provisions the entry or crossing over any land when such entry or crossing is done under a bona fide claim of right or ownership of said land, it being the intention of this section only to prohibit any wanton trespass upon the private land of others."

Statement

The instant case had its origins in Greensboro, North Carolina, on February 1, 1960 in the attempt of Negro citizens to obtain equal treatment with that afforded to whites in such public accommodations as food, transportation, entertainment and recreation. On that day, four Negro students at the North Carolina A. & T. College, who had grown increasingly impatient with prevailing practices under which Negro students could not obtain food and re-

freshment served at local stores, determined to seek service at a local lunch counter in Greensboro. This modest incident marked the beginning of widespread efforts in a number of states, including Maryland, to open service for Negroes in places of public accommodation. See Pollitt, *Dime Store Demonstrations*, 1960 Duke L. J. 315. One of those efforts, from which this case arose, took place at the amusement park serving the Nation's Capital.

Glen Echo Amusement Park, the major amusement facility in the District of Columbia area, is located in Montgomery County, Maryland. The Park is operated by a corporation licensed to do business in the State of Maryland (R. 3; 78, n. 1). In the years up to 1960, Glen Echo Park was frequented by white customers only (R. 46-47), with the exception of Negro maids accompanying white children (as long as they "didn't do anything in the park" (R. 41)).

On June 30, 1960, a number of persons, including petitioners, gathered outside the main entrance of the Park to urge publicly that Negro patrons be permitted to use the Park's facilities and to seek service for Negro patrons by peaceable means (R. 59-71). A picket line protesting racial segregation was set up outside the main entrance to the Park (R. 62-63). No tickets of admission were required for entry into the Park (R. 17) and petitioners, young Negro students participating in the Glen Echo protest, entered the Park through the open main gates at about 8:15 p.m. (R. 6-7). While petitioners were generally aware of Glen Echo's long-standing discriminatory policy, they were hopeful that the management would not refuse them service (R. 61-63, 69). Having entered the Park without difficulty, petitioners took seats on the horses and other animals of the carousel and sought to enjoy a merry-

go-round ride (R. 7-8), for which they had in their possession valid tickets of admission (R. 17; 59).¹

Petitioners, as we have said, were hopeful that the Park would not refuse them the service which it advertised and rendered to the general public. Their attempts at service were not unreasonable, considering that no tickets were required for admission to the Park itself (R. 17), that none of the signs around the Park indicated any discrimination against Negro customers (R. 60), and that in its press, radio and television advertising in the District of Columbia area the management invited "the public generally" without distinction of race or color (R. 45-46).

It soon developed, however, that petitioners were not going to be able to ride the carousel on which they had taken places. While the carousel remained stationary, petitioners were approached by one Francis J. Collins, (R. 8). Collins was employed by the Glen Echo management as head of the special police force at the Park under arrangement with a private detective service, the National Detective Agency (R. 5, 14-15) and was deputized as a Special Deputy Sheriff of Montgomery County on the request of the Park management (R. 14).² Collins was dressed in the uniform of the National Detective Agency and was wearing the Special Deputy Sheriff's badge representing his state

¹ Friends of the petitioners had purchased these tickets and had given them to petitioners (R. 60). There is no suggestion that the management placed any restriction upon the transfer of tickets to friends and relatives; indeed, it was conceded by an agent of the Park that transfers frequently occurred in his presence (R. 17). No offer to refund the purchase price was made to petitioners (R. 17).

² The private force at the Park included at least two employees deputized as Special Deputy Sheriffs (R. 55) pursuant to ~~Montgomery County Code (R. 55)~~ pursuant to Montgomery County Code (1955) Sec. 2-91, which provides that the sheriff "on application of any corporation or individual, may appoint special deputy sheriffs for duty in connection with the property of . . . such corporation or individual; . . . to be paid wholly by the corporation or person on whose account their appointments are made."

authority (R. 14). On the orders of and on behalf of the Glen Echo management (R. 7, 54), but wearing the badge of his office under the State, Collins "gave them five minutes to get off the property" (R. 7), explaining that it was "the policy of the park not to have colored people on the rides, or in the park" (R. 8). Petitioners declined to obey Collins' order, remaining on the carousel for which they tendered their tickets of admission (R. 8, 17). Having unsuccessfully directed petitioners to leave the premises, and still acting pursuant to his employers' instructions (R. 7, 54) but exercising his police authority (R. A), Collins now arrested petitioners (R. 12) for trespass in violation of Art. 27, Sec. 577 of the Code (R. A). There was no suggestion that petitioners were "disorderly in any manner" (R. 77).

At the Montgomery County Police precinct house where petitioners were taken after their arrest (R. 12), once more acting upon his employers' instructions but exercising his public office, Collins preferred sworn charges for trespass against petitioners by executing an "Application for Warrant by Police Officer" (R. A). Upon Collins' charge, a "State Warrant" was issued by the justice of the peace (R. B), leading to petitioners' trial under the Maryland "wanton trespass" statute, Code Art. 27, Sec. 577.³

Petitioners' trial in the Circuit Court for Montgomery County on September 12, 1960, elicited the circumstances under which petitioners were warned off Glen Echo premises and arrested and accused of trespass by Collins, acting

³ Apparently the State had difficulty deciding, in view of the continuous commingling of Collins' functions, whether Collins had been exercising his public or his private powers in enforcing segregation at Glen Echo Amusement Park. The State Warrant filed on August 4, 1960 (R. B) alleging that petitioners had refused to leave the Park "after having been told by the Deputy Sheriff for Glen Echo Park" to leave the property, was replaced by an Amended State Warrant of September 12, 1960 (R. C) alleging that they had refused to leave "after having been duly notified by an agent of Kebar, Inc." not to remain on the property.

on the orders of the private management and contemporaneously exercising the powers of his public police office as a Deputy Sheriff. At the trial, Collins, Park co-owner Abram Baker, and Park Manager Woronoff, all elaborated upon the orders given by the management to Collins with respect to his enforcement of racial discrimination. Co-owner Abram Baker admitted that from the first day of Collins' employment, management had instructed him to enforce segregation. (R. 37). Baker candidly described his use of private-employee-deputy-sheriff Collins to enforce racial discrimination:

"Q. Did you instruct Lieutenant Collins to arrest all negroes who came on the property, if they did not leave?

"A. Yes.

"Q. That was your instructions?

"A. Yes.

"Q. And did you instruct him to arrest them because they were negroes?

"A. Yes" (R. 39-40).

Deputy Sheriff Collins equally affirmed that he arrested petitioners "because they were negroes," and explained that "I arrested them on orders of Mr. Woronoff, due to the fact that the policy of the park was that they catered just to white people . . ." (R. 16). Park Manager Woronoff also testified that Glen Echo's policy was "to maintain the park on a segregated basis" (R. 53) and that when he learned of petitioners' presence in the Park, "I instructed Lieutenant Collins to notify them that they were not welcome in the park, and we didn't want them there, and to ask them to leave, and if they refused to leave, within a reasonable length of time, then they were to be arrested for trespass" (R. 54).

Petitioners' constitutional objections to the State's par-

participation in and support of racial discrimination, were repeatedly rejected by the trial court (R. 4, 12, 55, 71, 72-75). Petitioners were convicted and fined (R. F; 72-75). The Maryland Court of Appeals affirmed the convictions (R. 76), holding that, under the wanton trespass statute, petitioners' refusal to leave the premises upon instructions of management agent Collins, constituted unlawful "entry or crossing over" the property "after having been duly notified by the owner or his agent not to do so". The Court dismissed petitioners' arguments that State support of racial discrimination by a public commercial enterprise violated the Fourteenth Amendment, finding the case to be "one step removed from State enforcement of a policy of segregation" (R. 82).

This Court has granted review in this and a number of other cases which involve similar or related questions regarding the conviction for crime of young Negroes and their white associates seeking to utilize facilities licensed to provide accommodations to the general public. In addition to the cases granted review, a number of other petitions are pending in this Court and numerous cases are before state courts, all raising related constitutional questions. Because of the importance of the issues presented and the impact of this Court's ruling, which will necessarily have effect beyond the individual cases now before the Court, we enlarge in the Argument on the various legal considerations involved in racial discrimination at public accommodations and its enforcement by the authority of the state.

Summary of Argument

I

The State of Maryland's supportive involvement in the racial discrimination of Glen Echo Park transgresses the equal protection clause of the Fourteenth Amendment.

What the State has done here falls well within the area of State action interdicted by this Court's rulings in *Shelley v. Kraemer*, 334 U.S. 1 and *Barrows v. Jackson*, 346 U.S. 249.

In *Shelley*, and later in *Barrows*, this Court ruled that judicial recognition or enforcement of private undertakings to practice segregation constitutes denial by the state of the equal protection guaranteed by the Fourteenth Amendment. In the instant case it is clear that no less than in *Shelley* and *Barrows*, the courts of the State of Maryland have become the means for enforcing racial discrimination. Indeed, the instant case is far stronger than *Shelley*, for here the State's judicial process, indeed its criminal process, has been made available to enforce discrimination not by merely private parties as in *Shelley*, but rather by proprietors of an important accommodation catering to the public at large.

Actually, there is far more in the instant case than mere judicial enforcement of racial discrimination—here the closest interplay existed at every stage between the discrimination at Glen Echo Park and the authority of the State, which was loaned to the owners for the enforcement of their discrimination. Not only the judicial and prosecutory power of the State of Maryland has been employed to enforce discrimination, but the State's police authority was handed to the Glen Echo management on a formalized basis for the continuing administration and enforcement of its discriminatory policy. As regards enforcement of segregation, there was absolutely no severance at any time between public and private authority at Glen Echo Park.

Moreover, in addition to the direct involvement of the State in segregation at Glen Echo Park through its police and judicial powers, the State of Maryland was also in-

extricably involved in the surviving community custom of segregation fostered by decades of statutory segregation. We do not believe that Maryland's belated abandonment of compulsory segregation serves to extricate the State from responsibility for a public practice which has survived beyond the era when it was official State policy.

Petitioners' convictions for "trespass", which serve to enforce the racial practice of a licensed business catering to the general public, clearly offend the mandate of the Fourteenth Amendment under authoritative rulings of this Court. None of the arguments advanced in support of the State court rulings in this or the companion cases deny that the practice of segregation is supported and buttressed by the States' involvement in all these cases. Rather, reliance is placed upon three "confession and avoidance" arguments to justify or excuse the admitted State involvement in the discriminatory practices at hand. None of these defensive contentions justifies or excuses the State action here involved in support of racial discrimination.

The State's first contention is that this prosecution and conviction is a neutral manifestation of Maryland's general interest in enforcing "property rights" and that the Fourteenth Amendment is not violated unless the State's purpose, as well as its effect, is to give support to discrimination. But discriminatory "motivation" by the State can hardly be the *sine qua non* of the Fourteenth Amendment's applicability when as a matter of fact the exercise of the State's power supports and abets racial discrimination. In any event, in the instant case it is clear that not only the effect but also the purpose of the State's "neutral" action has been to give support to Glen Echo's racial policy. Having put its police authority under the orders and control of the Park for enforcement of

racial discrimination, the State cannot now be heard to disavow the owners' racial purpose.

To the second contention, that application of the *Shelley* principle in the instant cases would leave states helpless to defend the sanctity of the home and the privacy of its owner, the direct answer is that these cases do not involve the home. Far from seeking privacy, the establishments involved in these cases are open to and cater to the trade of the public at large. See *Marsh v. Alabama*, 326 U.S. 501. There is no privacy to be protected in a place of public accommodation catering to thousands of amusement-seekers.

To the third argument, that proprietors will utilize forcible self-help to eject Negroes if they cannot do so through the police, we submit that the public record demonstrates the unlikelihood of any such action. For it is not the habit of proprietors seeking the trade of the public to engage in the dirty business of self-help ousters of Negroes seeking to give their patronage; rather they rely upon police forces to oblige in the enforcement of the "unwritten law." There is every reason to believe that the removal of state support for discrimination will be the occasion not for the advent of forcible self-help but for the demise of segregation in public accommodations. And all apart from the fact that there is no issue of self-help directly involved in this case and from the overwhelming public record that racial discrimination in places of public accommodation will not outlive the withdrawal of state supports, it should be noted that there is at least grave doubt whether a proprietor could legally engage in self-help to remove Negro would-be patrons.

The Fourteenth Amendment does not permit the State of Maryland to utilize its police powers of enforcement, arrest, accusation and prosecution and its judicial powers of

trial and conviction to administer and effectuate racial discrimination at an amusement park catering to the general public. None of the hypothetical or practical arguments advanced in support of the state court rulings in this and the companion cases permits a state by police or judicial action to aid in the enforcement of a policy of segregation at places of public accommodation.

II

States may not, consistent with the equal protection guarantee, permit racial discrimination at public accommodations. Only a few months ago, Mr. Justice Douglas, in a concurring opinion in *Garner v. Louisiana*, 368 U.S. 157, 176, pointed to the intimate contacts between the state and a restaurant authorized to cater to the general public, and concluded (182) that "those who run a retail establishment under permit from a municipality operate, in my view, a public facility in which there can be no more discrimination based on race than is constitutionally permissible in the more customary types of public facility."

The equal protection clause applies when "to some significant extent the State in any of its manifestations has been found to have become involved" with a private enterprise engaging in racial practices. *Burton v. Wilmington Parking Authority*, 365 U.S. 715. Analysis demonstrates that the State of Maryland is intimately involved in such public accommodations as Glen Echo. In its varied licensing and inspection requirements for the protection of the public interest and welfare, the State of Maryland has manifested its high concern regarding the operation of Glen Echo. In its many regulatory measures relating to the enterprise, the State further demonstrates its concern for the public interest in the operation of the public accommodation involved. But the State's involvement does not

end with licensing, inspection and regulation; in a myriad of ways governments provide assistance to public accommodations. These varying measures of governmental assistance once more demonstrate the state's consciousness of the public interest involved—the enterprise may be privately owned but the interest served is public and receives the active supportive energies of government.

The State has obviously "become involved" in the operation of public accommodations licensed, regulated and supported by its agencies. The "private property" concepts which underlay this Court's refusal in the 1883 *Civil Rights Cases* to give necessary scope to the Fourteenth Amendment's guarantee of equal protection, cannot today remain dispositive of the question whether the State of Maryland may permit public accommodations to discriminate against Negroes. No reason appears why this Court should decline to give controlling significance in equal protection cases to the public interest consideration it finds dispositive in economic due process cases. Cf. *Nebbia v. New York*, 291 U.S. 502.

One hundred years after Emancipation, the effort at true emancipation cannot succeed while great public enterprises, operating with the license, approval, assistance and control of the states, remain beyond the constitutional obligation to afford Negro citizens equal participation in the life of the community. As history has proved Justice Harlan correct in his dissent in *Plessy*, it has also corroborated his forebodings in the *Civil Rights Cases* about a ruling which, under the guise of "proprietor's rights," carved from the promise of equal protection the area of public life dominated by "corporations and individuals wielding power under the States" to supply public services and accommodations. Any reappraisal today leads inexorably to the

conclusion that state law must afford the Negro public equal service at places of public accommodation.

Argument

In this case members of the general public, which the Glen Echo Amusement Park is licensed to and purports to serve, were refused accommodation and treated as trespassers by the Park solely because they were Negroes. The State of Maryland freely lent its authority for the administration and enforcement of the discriminatory policy at the Glen Echo premises, and prosecuted and convicted petitioners of the crime of refusing to leave the establishment. There are thus presented two fundamental questions under the equal protection clause: *First*, assuming that Glen Echo was legally and constitutionally free to discriminate against Negro members of the public, may the State actively support Glen Echo's discriminatory practice in the manner and to the degree it did here? *Second*, consistent with the Fourteenth Amendment, may Maryland law, statutory or common, permit Glen Echo, a licensed place of public accommodation catering to the general public, to discriminate against Negro members of the public and to refuse them service solely because of their race?

We believe the Court need go no further than the first of these two questions. In the light of the State's very clear involvement in the administration and enforcement of segregation at Glen Echo, there is presented here a direct state transgression of the equal protection clause, which requires no broad ruling nor reconsideration of this Court's decision in the *Civil Rights Cases*, 109 U.S. 3. Since a narrow constitutional issue under *Shelley* and related decisions is presented by the first question concerning the State's supportive involvement in racial discrimination,

at Glen Echo, it is unlikely that the Court will reach the second and larger question. We note, however, that one member of the Court (see opinion of Mr. Justice Douglas in *Garner v. Louisiana*, 368 U.S. 157, 176) recently dealt in a concurring opinion with the broader question whether a public accommodation is legally and constitutionally permitted to discriminate against the Negro public. For this reason, as well as for the sake of completeness and because the answer to the second question may serve to illuminate the first, we advance for the Court's consideration the reasons why state law cannot permit exclusion of persons because of their race from a licensed place of public accommodation which caters to and renders an important service to the general public. This ground of decision would, of course, require critical reappraisal of the Court's rationale in its 1883 opinion in the *Civil Rights Cases*. However, if this second question were resolved in petitioners' favor as we believe it would have to be, such a ruling would provide a uniform resolution of the pending cases, for it would require establishments purporting to serve the public equally to serve Negro members of the public. The Constitution, in our view, not only permits Negro members of the public to sit on the carousel free of state interference, but also requires management to operate it for their benefit as it does for whites. For these reasons we have deemed it important to brief both questions for the Court's consideration.

The State's Supportive Involvement in the Racial Discrimination of Glen Echo Park Transgresses the Equal Protection Clause of the Fourteenth Amendment.

The instant case is one of a number of proceedings challenging state prosecutions of Negro patrons and white associates at places of public accommodation. The first

premise of the challenge against the criminal proceedings involved in the pending cases is that such exertions of state power in support of the racially discriminatory practices of enterprises serving the public, constitute "state action" forbidden by the Fourteenth Amendment. What the states have done in all these cases falls well within the area of state action interdicted by this Court's rulings. See *Shelley v. Kraemer*, 334 U.S. 1, and *Barrows v. Jackson*, 346 U.S. 249.

(1) Long before *Shelley*, this Court emphasized that the Fourteenth Amendment's requirement of equal treatment by the state reaches "state action of every kind"—legislative, executive and judicial. See *Virginia v. Rives*, 100 U.S. 313, 318; *Ex Parte Virginia*, 100 U.S. 339. In *Shelley* and later in *Barrows*, the Court ruled that judicial recognition or enforcement of private undertakings to practice segregation constitutes denial by the state of the equal protection guaranteed by the Fourteenth Amendment. In the instant case it is clear that no less than in *Shelley* and *Barrows*, the courts of the State of Maryland have become the means for enforcing racial discrimination. Nor is it any answer to say that the State courts are merely vindicating "property rights": for this Court has explicitly answered that contention in *Shelley*, ruling that the Fourteenth Amendment circumscribes "the power of the state to create and enforce property rights." We submit that *Shelley* controls the instant case and precludes the affirmance of criminal convictions for "trespass" of persons ordered off premises and arrested and accused "because they were Negroes."

(2) Moreover, the instant case is far stronger than

⁴ This was the holding of the Third Circuit, one directly contrary to the ruling below under similar factual circumstances, in *Valle v. Stengel*, 176 F. 2d 697.

Shelley, for here the State's judicial process, indeed its criminal process, has been made available to enforce discrimination not by merely private parties as in *Shelley*, but rather by proprietors of an important accommodation catering to the public at large. If, as this Court's *Shelley* ruling held, state courts may not lend their powers to the enforcement of discrimination as between merely private parties, they may do so *even less* to enforce discrimination at premises licensed for, advertised, and dedicated to the custom of the public.⁵

This is the position well articulated and elaborated before this Court in a brief amicus for the United States two terms ago. In *Boynton v. Virginia*, 364 U.S. 454, the Solicitor General urged reversal of a Virginia trespass conviction upon the ground being urged in the pending cases, that the Fourteenth Amendment precludes a state's enforcement of racial discrimination by a business catering

⁵ The case here is rendered particularly strong by the fact that a state-licensed enterprise of public accommodation has been the beneficiary of state support in its discrimination. Thus it would hardly be argued that a state may license public accommodations expressly to serve the white public. Yet, while the State's license here may in form be neutral, when the State through its courts enforces racial segregation at the licensed premises, then *in effect* the State has licensed and authorized an enterprise to provide accommodations to the white public alone.

This the State clearly may not do. As Mr. Justice Douglas stated in his concurring opinion in *Garner v. Louisiana*, 368 U.S. 157, 184: "I do not believe that a State that licenses a business can license it to serve only whites or only blacks or only yellows or only browns. Race is an impermissible classification when it comes to parks or other municipal facilities by reason of the Equal Protection Clause of the Fourteenth Amendment. By the same token, I do not see how a State can constitutionally exercise its licensing power over business either in terms or in effect to segregate the races in the licensed premises. The authority to license a business for public use is derived from the public. Negroes are as much a part of that public as the whites. A municipality granting a license to operate a business for the public represents Negroes as well as all other races who live there. A license to establish a restaurant is a license to establish a public facility and necessarily imports, in law, equality of use for all members of the public." ○

to the public. In the Government's Brief before this Court (at p. 17), the Solicitor General emphasized that "The application of a general, nondiscriminatory, and otherwise valid law to effectuate a racially discriminatory policy of a private agency, and the enforcement of such a discriminatory policy by state governmental organs, has been held repeatedly to be a denial by state action of rights secured by the Fourteenth Amendment." Pertinent judicial rulings, the Solicitor General pointed out, demonstrate that *"where the state enforces or supports racial discrimination in a place open for the use of the general public . . . it infringes Fourteenth Amendment rights notwithstanding the private origin of the discriminatory conduct"* (at p. 20). The Solicitor General concluded that the conviction for "trespass" of a Negro seeking service at a Richmond, Virginia, restaurant constituted unlawful state support to private discrimination, and that

"When a state abets or sanctions discrimination against a colored citizen who seeks to patronize a business establishment open to the general public, the colored citizen is thereby denied the right 'to make and enforce contracts' and 'to purchase personal property' guaranteed by 42 U.S.C. 1981 and 1982 against deprivation on racial grounds" (at p. 28).

Since in the instant case the State court judgment of conviction constitutes direct enforcement at a public accommodation of segregation against members of the public treated as trespassers "because they are Negroes", the authoritative rulings of this Court preclude an affirmance of the judgment below.⁶

⁶ An additional ground for reversal may inhere in the fact that the highest court of Maryland has here construed the Maryland enactment "as authorizing discriminatory classification based exclusively on color." See

(3) Actually there is far more in the instant case than mere *judicial* enforcement of racial discrimination—here the closest interplay existed at every stage between the discrimination at Glen Echo Park and the authority of the State, which was loaned to the owners for the enforcement of their discrimination. Not only the judicial and prosecutory power of the State of Maryland has been employed to enforce discrimination, but the State's police authority was handed to the Glen Echo management on a formalized basis for the continuing administration and enforcement of its discriminatory policy. Deputy Sheriff Collins, not upon the mere request but upon the *orders* of the private management which employed him, and wearing the badge of his public office, informed and instructed petitioners that because they were Negroes they would have to leave the premises. Collins and his associates were thus administering the Park's policy of racial discrimination on a day to day basis. Collins' direction to the petitioners to leave the premises constituted unconstitutional state involvement in the "private" practice of discrimination.⁷

concurring opinion of Mr. Justice Stewart in *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 726. But for the State trespass statute, petitioners' conduct would not have been a crime. As construed below, the statute requires the conviction of one who remains on property "after having been duly notified by the owner or his agent not to do so" *because he is a Negro*. Thus, as construed below, the statute clearly authorizes a discriminatory classification based exclusively on color.

⁷ The court below found Deputy Sheriff Collins' involvement in administering segregation at Glen Echo no different than that of a regular police officer casually called upon for assistance by management (R. 82). While in our view the Constitution precludes either type of police involvement in administering racial segregation at public accommodations, it must be noted that the two situations are not identical. Unlike the policeman requested to make an arrest for trespass, the police power here was under the pay and control of the private management which ordered Deputy Sheriff Collins to administer its discriminatory policy (R. 16). In this commingling of public and private powers at Glen Echo, there was irretrievably surrendered the discretion and integrity ordinarily attaching to the policeman's badge. It seems clear (Cf. *Steele v. Louisville & Nashville*

Indeed, it was officer Collins who created the crime of which petitioners were convicted. His direction to petitioners to leave the premises was a necessary ingredient of the offense under the statute, which is committed only "*after having been duly notified by the owner or his agent.*" Then, to add even further state support, still following the orders of his employers and in his capacity as an officer of the State, Collins arrested petitioners and filed warrants under oath against them, bringing into play the prosecutorial machinery of the State.⁸

R. Co., 323 U.S. 192; *Marsh v. Alabama*, 326 U.S. 501) that the loan of the State's police badge is accompanied by a constitutional prohibition on its use for the enforcement of "private" racial practices.

⁸ Collins, who was under the orders of his private employers to accuse petitioners of trespass, did so in his public capacity. This is reflected in the "Application for Warrant by Police Officer" (R. A), filed by Collins on his sworn allegation "that he is a deputy sheriff . . . and as such . . . did observe" the alleged offense, and in the State Warrants (R. B, C) reciting that "complaint hath been made upon the information and oath of Lieutenant Collins, Deputy Sheriff . . ."

While the court below points out (R. 82) that Collins might have filed his accusation in his private capacity, it is significant that he did not. Maryland employs an accusatory system in petty offenses based upon the discretionary authority of justices of the peace to arraign persons for trial upon complaint to them of an offense having been committed. Code Article 52, Sections 13 to 25. One who persuades a justice of the peace "in his discretion" (Art. 52, Sec. 23) to issue a state warrant, has procured the trial of the accused in the absence of further affirmative action to amend or dismiss the warrant, by the justice of the peace (Art. 52, Sec. 22) or the trial court (Art. 52, Sec. 13; in Montgomery County Art. 52, Sections 25 and 99). That the justice of the peace is influenced in the exercise of his discretionary accusatory power by the fact that a police official is the complainant, is indicated by his maintenance of a separate form of "Application for Warrant by Police Officer" which, unlike the form used by private applicants, requires no listing of other witnesses, is issued in part on the basis of unsworn verbal representations to the justice by the officer of the law, and on his oath that "as a member of the Montgomery County Police Department," he believes the accused guilty (R. A). In these circumstances, it cannot be said that, in the exercise of the justice of the peace's discretionary power to accuse petitioners and thus to bring them to trial, it was inconsequential that the complaint made by Collins, pursuant to his employers' orders, was in his official capacity as a police officer.

It could hardly be more obvious, we submit, that as regards enforcement of segregation there was absolutely no severance at any time between public and private authority at Glen Echo Park. The Park's policy of racial discrimination was at all times being administered and enforced by the State through Deputy Sheriff Collins and his colleagues. Here the State of Maryland was not merely enforcing racial discrimination through prosecution in the courts, but was itself administering that discrimination on a day to day basis at the premises of the largest public amusement facility in the District of Columbia area. Cf. *Pennsylvania v. Board of Trustees*, 353 U.S. 230. Indeed, but for the State's ready support, the management might not have discriminated against the Negro patrons. Actually, shortly after that State support was challenged in the instant case and in a Federal suit filed by Negro patrons to bar further arrests at Glen Echo (*Griffin v. Collins*, Civil Action No. 12308, D. C. Md. (1960)), the Park abandoned its practice of segregation (see *Washington Post*, March 15, 1961, p. 1, col. 2).

As this Court recently phrased the presently applicable principle in *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 722, the equal protection clause comes into play when "*to some significant extent the State in any of its manifestations has been found to have become involved*" in private conduct abridging individual rights. The applicability of this rule is clear and direct where, as here, the State has become involved through police administration and enforcement of the day to day operation of the Park's discriminatory policies.⁹

⁹ It is also plain that the decision in the *Civil Rights Cases*, 109 U.S. 3, has no bearing upon the issue of such police administration and enforcement of racial segregation at public places. As the Court there took pains to point out (pp. 19, 21), that case was resolved "on the assumption that a right to enjoy equal accommodation and privileges in all inns, public

(4) Moreover, in addition to the direct involvement of the State in segregation at Glen Echo Park through its police powers of enforcement, arrest, accusation and prosecution and its judicial powers of trial and conviction, the State of Maryland was also inextricably involved in the surviving community custom of segregation fostered by decades of statutory segregation. In the companion cases coming from Southern States, there are urged strong constitutional considerations arising from the involvement of those States in the prevailing custom of segregation at public establishments through a variety of existing segregation statutes and ordinances. While Maryland, with its more "Northern" orientation, has repealed some segregation statutes and has ceased to enforce others, it is relevant that not too long ago the State still required segregation in many areas of public life and even yet has not fully desegregated its public schools. We do not believe that Maryland's belated abandonment of compulsory segregation serves to extricate the State from responsibility for a public practice which has survived beyond the era when it was official State policy.¹⁰

conveyances, and places of public amusement, is one of the essential rights of the citizen which no State can abridge or interfere with," and that it was not presented with the issue whether denial of equal service at such establishments "might not be a denial of a right which, if sanctioned by the state law, would be obnoxious to the prohibitions of the Fourteenth Amendment" (emphasis supplied).

¹⁰ Maryland was a slave-holding, border State. Its code of segregation laws historically has not been materially distinguishable from the Jim Crow laws of Southern States. A number of these segregation statutes have been repealed. (See Ann. Code of Maryland 1939, Art. 27 § 510-526, segregation on railroads and steamboats; Laws of Maryland, 1951, Chapter 22, p. 58.) There remain on the books however a number of segregation statutes. See e.g. Ann. Code of Maryland 1957, Art. 65A, § 1-4; Art. 49B, § 5; Art. 78A, § 14; Art. 77, § 279; Art. 27, § 655; Art. 77, § 226; Art. 27, § 646-648; Art. 27, § 393; and Art. 27, § 398. As recently as 1937 the Court of Appeals of Maryland held that "separation of the races is

(5) Petitioners' convictions for "trespass", which serve to enforce the racial practice of a licensed business catering to the general public, clearly offend the mandate of the Fourteenth Amendment under authoritative rulings of this Court. None of the arguments advanced in support of the State court rulings in this or the companion cases deny that the practice of segregation is supported and buttressed by the States' involvement in all these cases. Rather, reliance is placed upon three "confession and avoidance" arguments to justify or excuse the admitted State involvement in the discriminatory practices at hand: First, it is asserted that the state's support to discrimination by criminal actions and convictions for trespass, is merely the state's "neutral" vindication of property rights for whatever cause the owner may invoke them; second, it is urged that *Shelley* should not be applied to trespass situations because states would otherwise be powerless to protect the sanctity of the home and its privacy; third, it is argued that if this Court holds states powerless to enforce discrimination at public accommodations, private proprietors will resort to forcible self-help for continued discrimination against Negroes. We turn to a brief answer to each of these defensive contentions.

(a) "*Neutral*" Vindication of Property Rights. The

normal treatment in this state" (*Williams v. Zimmerman*, 172 Md. 563, 192 A. 353).

The 1957 Annual Report of the Commission on Interracial Problems and Relations to the Governor and General Assembly of Maryland (p. 13) portrayed a pattern of segregation in Baltimore by which Negroes were excluded or segregated at 91% of all public facilities. The Baltimore picture, the Commission held, "would certainly reflect a pattern which exists in greater degrees of discrimination throughout Maryland's twenty-three counties." In its 1962 Report (at p. 23) the Commission reported that "the process of voluntary desegregation, in the absence of lawful regulation, has proved slow and inconsistent." Today's custom, though it may be attenuated and though it may no longer have the full force of law is certainly derived from recently-enforced statutory enactments of the State of Maryland.

court below ruled that the arrest and conviction of petitioners "as a result of the enforcement by the operator of the park of its lawful policy of segregation," could not "fairly be said to be" the action of the State. In so doing, the court below apparently accepted the contention of the State that this prosecution and conviction is a neutral manifestation of Maryland's general interest in enforcing "property rights," devoid of any racial connotation. This contention does not question that the exercise of the State's power has had the effect of supporting the practice of racial discrimination; rather, it suggests that the Fourteenth Amendment is not violated unless the State's purpose is to give support to discrimination.

But discriminatory "motivation" by the State can hardly be the *sine qua non* of the Fourteenth Amendment's applicability when as a matter of fact the exercise of the State's power supports and abets racial discrimination. The courts of Maryland convicted petitioners with clear understanding that racial discrimination was being enforced. Nowhere in the restrictive covenant decisions or in the formulation in *Wilmington Parking Authority* is a motive requirement suggested; recently, in *Gomillion v. Lightfoot*, 364 U.S. 339, this Court rejected a similarly confining motivational interpretation of the Fourteenth Amendment's equality guarantee. The contention that the state is neutrally enforcing property rights rather than intending to assist discrimination, was explicitly rejected in *Shelley*, (334 U.S. 1, 22), this Court emphasizing that "the power of the State to create and enforce property interests must be exercised within the boundaries defined by the Fourteenth Amendment."¹¹

¹¹ There may be some concern that this Court's ruling in *Shelley* would give constitutional import, outside the area of racial discrimination, to situations where state courts enforce private relationships characterized by unfairness which would offend the due process clause were the state its

In any event, in the instant case it is clear that not only the effect but also the purpose of the State's "neutral" action has been to give support to Glen Echo's racial policy. The State surrendered its police authority to the use and control of a private corporation for its enforcement of racial discrimination. Armed with police authority, Deputy Sheriff Collins obeyed the orders of his employers in seeking to expel and thereafter in arresting and charging petitioners for trespass. Acting under color of law, Collins had as his sole purpose the administration of discrimination; he admittedly ordered petitioners off the premises and arrested and accused them "because they were Negroes" (R. 46; 39-40). The State's police authority was thus prostituted to the management's racial purpose. Having put its police authority under the orders and control of the Park for enforcement of racial discrimination, the State cannot now be heard to disavow the owners' racial purpose.

(b) *Protecting the Privacy of the Home.* To the contention that application of the *Shelley* principle in the instant cases would leave states helpless to defend the sanctity of the home and the privacy of its owner, the direct answer is that these cases do not involve the home. Far from seeking privacy, the establishments involved in these cases are open to and cater to the trade of the public at large. This Court has had occasion to emphasize pre-

initiator. While the question is not, of course, presently before the Court, it might be noted that, in contrast to its flexible approach to due process under the Fourteenth Amendment, this Court has accorded categorical significance to the racial prohibition of the Equal Protection clause. The Court may validly make the same distinction as regards state judicial enforcement of "private" racial discrimination, on the one hand, and of "private" relationships characterized by arbitrariness or unfairness, on the other. Such a distinction would do no violence to the intention of the Fourteenth Amendment, which may be said in the area of race to seek the achievement of a desegregated social order (see *infra*, pp. 30 to 39), but to address itself in matters of fairness only to the "due process" of the state itself rather than to legislate a fair or just society.

cisely this distinction. In *Marsh v. Alabama*, 326 U.S. 501, the Court ruled that the exertion of state criminal authority on behalf of a proprietor's restriction on the liberties of a member of the general public on his premises was precluded by the Fourteenth Amendment. As the Court pointed out (at 505-506): "The State urges in effect that the corporation's right to control the inhabitants of Chickasaw is coextensive with the right of a homeowner to regulate the conduct of his guests. We cannot accept that contention. Ownership does not always mean absolute dominion. The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it." See also *Public Utilities Com'n v. Pollak*, 343 U.S. 451, 464, where the Court dismissed the contention that the Constitution secures to a passenger on a public vehicle "a right of privacy substantially equal to the privacy to which he is entitled in his own home." Privacy, said the Court, "is substantially limited by the rights of others when its possessor travels on a public thoroughfare or rides in a public conveyance."

Marsh and *Pollak* highlight the significance attaching to the fact that in the pending cases racial discrimination is being enforced by states on behalf of public establishments rather than on behalf of individuals, homeowners or associations seeking protection of rights of private possession or personal privacy. As the Government's brief affirmed with respect to a similar trespass prosecution in the *Boynton* case (at pp. 20, 22), the Fourteenth Amendment is infringed where the state "enforces or supports racial discrimination in a place open for the use of the general public," for the issue

"is not whether the right, for example, of a homeowner to choose his guests should prevail over peti-

tioner's constitutional right to be free from the state enforcement of a policy of racial discrimination, but rather whether the interest of a proprietor who has opened up his business property for use by the general public—in particular, by passengers travelling in interstate commerce on a federally-regulated carrier—should so prevail."

Glen Echo Amusement Park is a licensed business enterprise owned and operated by corporations chartered by the State of Maryland. It caters to the general public as the major amusement park in the District of Columbia area and none of its numerous advertisements through various means of public communication reflected any discrimination against Negro members of the public and no signs around the Park proclaimed any restriction upon the custom of Negro patrons. These factors underline the critical consideration in the instant case that the State's power has been invoked to enforce not personal privacy but public discrimination—to assist a business catering to the general public in its refusal of service to Negro members of that public. But he who seeks privacy must practice privacy. To the argument that rights of "privacy" must be given predominant standing here, the simple answer is that there is no privacy to be protected in a place of public accommodation catering to thousands of amusement-seekers. Cf. *Public Utilities Com'n v. Rollak*, 343 U.S. 451, 464.

(c) *Segregation By Forceful Self-Help*.¹² In its public

¹² The Supreme Court of North Carolina suggested in the *Avent* case that if an owner cannot bar Negroes "by judicial process as here, because it is State action, then he has no other alternative but to eject them with a gentle hand if he can, with a strong hand if he must." There is no issue of self-help directly involved in these cases and what we suggest in the text is that the contention is not only legally irrelevant but

school desegregation decisions this Court evidenced its concern regarding the impact of a constitutional ruling requiring widespread changes in local custom and practices. On this score, we submit that the public record demonstrates the unlikelihood of serious disturbance or danger attending the removal of state support to discrimination in public accommodations. For it is not the habit of proprietors seeking the trade of the public to engage in the dirty business of self-help ousters of Negroes seeking to give their patronage; rather they rely upon police forces to oblige in the enforcement of the "unwritten law." The recent wholesale abandonment of racial practices of the business community in many Southern localities, demonstrates that these practices are less the product of public attitudes or business necessity than the vestigial remains of former conditions, succored by the willingness of public authorities to enforce segregation. There is every reason to believe that the removal of state support for discrimination will hasten the demise of segregation in public accommodations.

Prior to February, 1960, lunch counters throughout the South denied normal service to Negroes. Six months later, lunch counters in sixty-nine cities had abandoned discriminatory practices (*The New York Times*, August 11, 1960, p. 14, col. 5); by October of 1960, the number of recently desegregated municipalities had mounted to more than one hundred (*The New York Times*, Oct. 18, 1960, p. 47, col. 5). During 1961 and 1962, desegregation has steadily continued.¹³

There is also direct evidence that removal of legal sanc-

tion is factually baseless. Indeed, in Durham, North Carolina, where *Avent* arose, the dime stores have since quietly abandoned discrimination.

¹³ See e.g. *The New York Times*, Feb. 7, 1962, p. 40, col. 5 (Memphis); *The Washington Post*, April 9, 1962, p. 5, col. 2 (Houston); *The Washington Post*, Sept. 13, 1962, p. 18, col. 1 (New Orleans).

tions supporting segregation in public places effectively obviates further conflict or difficulty. When state segregation laws were struck down, public libraries in Danville, Virginia, and Greenville, South Carolina, were closed to avoid desegregation; they reopened a short time later, first on a "stand up only" basis and then on a normal basis, all without incident. When public swimming pools were judicially ordered to desegregate, those in San Antonio, Corpus Christi, Austin, and others integrated without difficulty. See Pollitt, *The President's Powers in Areas of Race Relations*, 39 N.C.L. Rev. 238, 275. Similarly, Miami Beach, Houston, Dallas and other communities integrated their public golf courses without incident. *Ibid.* And experience has likewise disproved the *in terrorem* argument against desegregation suggested in cases involving Pullman cars (*Mitchell v. United States*, 313 U.S. 81), dining cars (*Henderson v. United States*, 339 U.S. 816), buses (*Morgan v. Virginia*, 328 U.S. 373), and air travel and terminal service (*Fitzgerald v. Pan American World Airways*, 229 F. 2d 499; *Nash v. Air Terminal Services*, 85 F. Supp. 545). ①

In the instant case, no possible difficulty could arise from this Court's invalidation of State support for segregation at Glen Echo.¹⁴ The Park abandoned its prior racial practices in 1961 (see *The Washington Post*, March 15, 1961, p. 1, col. 2) and Montgomery County recently adopted a public places law (Ordinance 4-120, adopted by County Council, January 16, 1962). Unquestionably, an element in the man-

¹⁴ As the trial judge himself observed in his opinion (R. 74):

"If the Court of Appeals of Maryland decides that a negro has the same right to use private property as was decided in the school cases, as to State or Government property, or if the Supreme Court of the United States so decides, you will find that the places of business in this County will accept that decision, in the same manner, and in the same way that public authorities and the people of the County did in the School Board decision . . ."

agement's abandonment of discrimination was petitioners' challenge to the State's enforcement of discrimination. The national evidence equally demonstrates that state enforcement provides the essential buttress for continued racial discrimination at places of public accommodation.¹⁵

The Fourteenth Amendment does not permit the State of Maryland to utilize its police powers of enforcement, arrest, accusation and prosecution and its judicial powers of trial and conviction to administer and effectuate racial discrimination at an amusement park catering to the general public. None of the hypothetical or practical arguments advanced in support of the state court rulings in this and the companion cases permits a state, by police or judicial action, to aid in the enforcement of a policy of segregation where broad public interests are involved. The quantum of state action here far exceeds that which this Court found adequate to bring into play the Equal Protection clause in earlier cases. We submit that under the Fourteenth Amendment Maryland cannot convict Negro youngsters of criminal trespass merely because they have sought to ride the merry-go-round in a place of public accommodation.

¹⁵ All apart from the fact that there is no issue of self-help directly involved in this case and from the overwhelming public record that racial discrimination in places of public accommodation will not outlive the withdrawal of state supports, it should be noted that there is at least grave doubt whether a proprietor could legally engage in self-help to remove Negro would-be patrons. A court would not afford equal protection of the laws if it gave effect to the defense of self-help in an action for assault where the use of force was predicated upon racial discrimination. As this Court said in *Barrows v. Jackson*, 346 U.S. 249 at 256, "The result of that sanction [damage awards] by the State would be to encourage the use of restrictive covenants." By the same token, giving effect to the legal defense of self-help would be to encourage discrimination at accommodations open to the public. Furthermore, since any power or right of self-help is necessarily derived from the state, its exercise on grounds of race would appear questionable to say the least.

II

States May Not, Consistent With the Equal Protection Guarantee, Permit Racial Discrimination At Public Accommodations.

In the preceding section of the Argument we have developed the considerations which preclude the State from enforcing, through its police powers of enforcement, arrest, accusation, and prosecution and its judicial powers of trial and conviction, racial discrimination at places of public accommodation. The discussion under Point I has proceeded on the assumption, *arguendo*, that the State may legally and constitutionally permit the proprietor of an establishment serving the public to discriminate against the Negro public so long as the State by police or judicial action does not aid in the enforcement of such discrimination. But the assumption that State law, statutory or common law, can consistent with the Fourteenth Amendment permit a public accommodation to pursue a "lawful policy of segregation" (R. 82) is itself subject to the most serious question. We submit that if this Court should reach this question in the present cases, it would be confronted with the ultimate issue lurking in the background of our developing law of equal protection: *Whether state law which permits or authorizes racial discrimination by establishments providing public accommodations is consistent with the constitutional mandate of equal protection.*¹⁶

¹⁶The court below refers to the enforcement of *Giles Echo's* "lawful policy of segregation" (R. 82)—a phrase which sharply points up the truly state-derived foundation of the so-called "right" to discriminate. For, if a public accommodation may "lawfully" discriminate against the Negro public, it is only because the state has permitted it so to do by its substantive law of proprietors' rights. But it is the teaching of *Shelley*, and even more clearly of *Barrows*, that the law of the state (whether statute or common law) may not give recognition to racial discrimination, except in areas clearly within the personal domain such as the privacy

Only a few months ago, a member of this Court found this ultimate issue presented for adjudication in *Garner v. Louisiana*, 368 U.S. 157, 176. Mr. Justice Douglas, in a concurring opinion, pointed to the intimate contacts between the state and a restaurant authorized to cater to the general public, and concluded (182) that "those who run a retail establishment under permit from a municipality operate, in my view, a public facility in which there can be no more discrimination based on race than is constitutionally permissible in the more customary types of public facility." We submit that no other conclusion can properly be reached, and that if the Court should review the questions it must rule that Maryland cannot permit Glen Echo to discriminate against petitioners because of their color and refuse them service at its premises.

The constitutional mandate for applying equal protection guarantees to places of public accommodation, was brilliantly set forth eighty years ago in Justice Harlan's historic dissent in the *Civil Rights Cases*, 109 U.S. 3. A review of the status of such establishments under law and in the social order led Justice Harlan to the view that the moving purpose of the Emancipation Amendments would be subverted were their ambit to exclude carriers, inns and similar public accommodations:

"In every material sense applicable to the practical enforcement of the Fourteenth Amendment, railroad corporations, keepers of inns and managers of places

of the home. In our view, expanded in the text above, it matters not whether the question arises in an owner-instigated prosecution or suit to expel Negroes; in a suit by Negroes to obtain admission to the premises, or in the day-to-day operation of the establishment without judicial intervention. Where genuine public interests are involved, as they are in each of these situations, under the Fourteenth Amendment the substantive law of the state cannot tolerate segregation and must require that accommodations chartered for and catering to the service of the public, refrain from discrimination against Negro customers.

of public amusement are agents or instrumentalities of the State, because they are charged with duties to the public, and are amenable, in respect of their duties and functions, to governmental regulation. It seems to me that, within the principle settled in *Ex parte Virginia*, a denial, by these instrumentalities of the State, to the citizen, because of his race, of that equality of civil rights, secured to him by law, is a denial by the State, within the meaning of the Fourteenth Amendment. If it be not, then that race is left, in respect of the civil rights in question, practically at the mercy of corporations and individuals wielding power under the States" (109 U.S. 3, 58).

However, a majority of the members of the Court in that era took a narrower view and, dividing persons into immutable categories of "official" and "private", found proprietors of public accommodations to fall within the latter category for purposes of the Equal Protection guarantee.

The mechanistic approach of the Court's majority in the *Civil Rights Cases* (and soon after in *Plessy*) has not survived modern exigencies evoking this Court's more recent adjudications. Beginning with the landmark voter discrimination cases (*Nixon v. Herndon*, 273 U.S. 536; *Nixon v. Condon*, 286 U.S. 73; *Smith v. Allwright*, 321 U.S. 649) and going on through *Steele v. Louisville & Nashville R. Co.*, 323 U.S. 192, and a series of subsequent rulings, this Court has applied the rule that when government has its "thumb on the scales," private conduct may become infused with the requirement of equal treatment. Such infusion has been found by the Court in areas of contracts (*Steele, supra*; *Shelley, supra*), transportation (*Henderson v. United States*, 339 U.S. 816), education (*Pennsylvania v. Board of Trustees*, 353 U.S. 230; and see *Cooper*,

v. *Aaron*, 358 U.S. 1, 19) and most recently in the case of a state-assisted public accommodation (*Burton v. Wilmington Parking Authority*, 365 U.S. 715). In the case last named, the Court warned that the equal protection requirement would apply when "*the State in any of its manifestations has been found to have become involved*" with a private enterprise engaging in racial practices.

In the present more refined formulation of the degree of state action necessary to bring "private action" within the reach of the Fourteenth Amendment, we respectfully submit that the State in many of its manifestations is indeed involved in public accommodations. Analysis demonstrates that the State is intimately involved in such public accommodations, which are licensed to perform valued public services upon a showing of capacity to serve the public interest, and are governmentally regulated and supported to further the serious public concern in the availability of the services provided. This is illustrated by a brief review of the applicable statutes of Maryland respecting the operation of an establishment such as Glen Echo Amusement Park:

(i) *License*. Under Section 15-7 of the Montgomery County Code (1960), it is made "unlawful for any person to hold in the county any picnic, dance, soiree or other entertainment for gain or profit to which the general public are admitted," without first having obtained a permit or license. By Section 15-8, the County Council is empowered to issue such permit or license upon payment of a reasonable fee, and to adopt "such rules and regulations in connection with such permit, license and fee as are necessary to protect the public health, safety and welfare." By Section 15-11, the Council is empowered to "inspect, license, regulate or limit as to location within the limits of the county any place of public amusement,

or recreation . . . and in order to safeguard the public health, safety, morals and welfare, to pass rules, regulations or ordinances . . .

In Chapter 75 of the Montgomery County Code the Council has promulgated specific regulations (in addition to general rules applicable to matters such as health, fire and sanitation) relative to the licensing and operation of amusement parks, theatres, dance halls, restaurants, cafes, inns, taverns, public swimming pools, etc. These rules prescribe the hours of operation (Section 75-1, 75-2) and other detailed matters. Operation without a license of "amusement parks operated for profit" (Section 75-9) is forbidden (Section 75-5, 75-16). Licenses are issuable by the Director of the Department of Inspection and Licenses (Section 75-6) two weeks after a copy of the application has been published in a newspaper of general circulation (Section 75-7). But no amusement park license may be granted until the park submits proof of sufficient financial responsibility, or adequate liability insurance coverage, to protect the public using the park" (Section 75-9). Payment of the license fee "entitles the operator of the amusement park" to operate all amusement devices not prohibited by law (Section 75-9). In these licensing and inspection requirements for the protection of the public interest and welfare, the State has manifested its high concern regarding the operation of the amusement accommodations involved. But even after the issuance of the State's approval for the operation of the establishment, continuing State concern is reflected in the system of regulation in the public interest.

(ii) Regulation. Licenses issued expire within one year (Section 75-10). They may be denied, revoked or suspended if the enterprise "constitutes a detriment, is injurious to, or is against the interests of, the public health,

safety, morals or welfare" (Section 75-11).¹⁷ While hearings are provided in cases of revocation and suspension, there is specific authority for the summary closing of the premises to prevent manifest nuisance or danger (Section 75-13). The County reserves its rights of visitation and inspection at the premises (Section 75-15). In these ways, by continual vigilance and inspection, the State further demonstrates its concern for the public interest in the operation of the public accommodation involved.

(iii) *Support.* In the creation and operation of its enterprise, the amusement facility also receives a variety of significant governmental supports. The State first gives it corporate existence and recognition, permitting it to exercise the attributes of a natural person with the privilege of limited liability. Then, with the grant of a permit to operate a public business, the State authorizes the facility to cater and advertise to the general public.

But the State's support does not end with the issuance of corporate charters and public licenses. In a myriad of ways governments provide assistance to public accommodations. Special supports are made available through urban renewal, fair trade protections, anti-trust laws and the like. And assistance is given by outright subsidies and supportive services of Departments of Commerce and Labor. Then, too, there is the vast area of local government assistance—the special zoning and license dispensations, the police protections, and the many daily manifestations of local concern for adequate public facilities. These

¹⁷ Such grounds of disqualification encompass among others (a) defects in the character of the owner or operator, (b) noncompliance with applicable laws and regulations, (c) excessive noise, traffic congestion or other nuisance on the premises, and (d) occurrence or repeated occurrence on the premises of crimes or misdemeanors such as drunkenness or immorality.

varying measures of governmental assistance once more demonstrate the State's consciousness of the public interest involved—the enterprise may be privately owned but the interest served is public and receives the active supportive energies of government.

In view of these manifold contacts just reviewed, can it possibly be said that the State has not "become involved" in the operation of public accommodations licensed, regulated, and supported by its agencies? We submit that the points of State involvement are too many and too intimate to allow an affirmative answer in the light of twentieth century relationships between government and public enterprise. Cf. *Public Utilities Com'n v. Pollak*, 343 U.S. 451, 462. But as important as their "state involvement" aspect, these contacts also express the State's recognition of the constitutionally relevant fact that public accommodations are clothed with a vital public interest.¹⁸ Once that fact be recognized, as urged by Justice Harlan in 1883, then vital constitutional principles come into play—those which this Court emphasized in a line of adjudications foreshadowed in *Munn v. Illinois*, 94 U.S. 113, and brought to full standing

¹⁸ This point was aptly put by Senator Sumner during the debate on an 1871 Civil Rights Act amendment. Senator Sumner stated:

"Each person, whether Senator or citizen, is always free to choose who shall be his friend, his associate, his guest. And does not the ancient proverb declare that a man is known by the company he keeps? But this assumes that he may choose for himself. His house is his 'castle'; and this very designation, borrowed from the common law, shows his absolute independence within its walls; nor is there any difference, whether it be palace or hovel; but when he leaves his 'castle' and goes abroad, this independence is at an end. He walks the streets; but he is subject to the prevailing law of Equality; nor can he appropriate the sidewalk to his own exclusive use, driving into the gutter all whose skin is less white than his own. But nobody pretends that Equality on the highway, whether on pavement or sidewalk, is a question of society. And, permit me to say, that Equality in all institutions created or regulated by law, is as little a question of society." *Cong. Globe*, 42nd Cong., 2d Sess. 382.

in *Nebbia v. New York*, 291 U.S. 502, and succeeding due process rulings. In the resulting test of government controls against the guarantees of due process, this Court's inquiry no longer ends with the discovery that the enterprise is private, but proceeds on to the question whether the public interest warrants the restraint imposed. This Court has thus definitively accepted Mr. Justice Holmes' view (*Lochner v. New York*, 198 U.S. 45, 75) that "the Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics." The "private property" concepts which underlay this Court's 1883 refusal to give necessary scope to the Fourteenth Amendment's guarantee of equal protection, cannot today remain dispositive of the presently pending question.

No reason appears why this Court should decline to give controlling significance in equal protection cases to the public interest consideration it finds dispositive in economic due process cases.¹⁹ Considerations of the highest order of public interest are involved in the availability of public services and accommodations without discrimination or segregation—their magnitude is measured by the cataclysmic struggle in which they were forged and the great Emancipation Amendments in which they are enshrined. Yet as long as these guarantees are thought to permit the wholesale denial to Negroes of public accommodations and the amenities of daily life which they provide, the Amendments remain, in Justice Harlan's prophetic words, merely "*splendid baubles*." For it cannot be gainsaid that in many states and localities vital areas of public life still remain foreclosed to Negro citizens. One hundred years after

¹⁹ Cf. St. Antoine, *Private Racial Discrimination*, 59 Mich. L. Rev. 993, 1008-1016.

We are not, of course, suggesting that the due process clause will be applicable in all circumstances and to the same degree as the racial prohibition of the equal protection clause. See note 11, p. 23, *supra*.

Emancipation there is presented in America the spectacle of apartheid communities where Negro citizens are neither truly free nor nearly equal. True, commendable progress is being made to render them free and equal "before the law"; but the effort at true emancipation cannot succeed while great public enterprises operating with the license, approval, assistance and control of the states, remain beyond the constitutional obligation to afford Negro citizens equal participation in the life of the community.

Plessy and the *Civil Rights Cases* are twin rulings born in an era of retreat from the guarantees of the Emancipation Amendments. After decades of damage to the moving purpose of those guarantees, this Court was induced to abandon the "separate but equal" doctrine, to restore the integrity of governmental involvement in public schooling and to remove a major obstacle to the achievement of a desegregated society. As history has proved Justice Harlan correct in *Plessy*, it has also corroborated his forebodings in the *Civil Rights Cases* about a ruling which, under the guise of "proprietary rights", carved from the promise of equal protection the area of public life dominated by "corporations and individuals wielding power under the States" to supply public services and accommodations.

Today the moving purposes of the Emancipation Amendments are yet to be fulfilled, while Negro Americans remain social outcasts in the economic and public life of their localities, relegated to the back of the bus in their ride to work and the back alley in their search for lunch hour refreshment. The default on a profound constitutional promise which these realities expose to view, compels a reappraisal of concepts which define Equal Protection so

narrowly as to rob it of its vitality. Such a reappraisal points inexorably to the conclusion that state law must afford the Negro public equal service at places of public accommodation.

Conclusion

For the reasons herein set forth, the judgment below should be reversed with instructions to dismiss the proceedings against petitioners.

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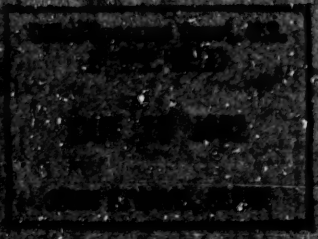
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In the Supreme Court of the United States

. OCTOBER TERM, 1962

No. 26

WILLIAM L. GRIFFIN, ET AL., PETITIONERS

v.

STATE OF MARYLAND

**ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE
STATE OF MARYLAND**

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

OPINIONS BELOW

The opinion of the Court of Appeals of Maryland (R. 76-83) is reported at 225 Md. 422, 171 A. 2d 717. The opinion of the Circuit Court for Montgomery County (R. 72-75) is not reported.

JURISDICTION

The judgment of the Court of Appeals of Maryland was entered on June 8, 1961 (R. 76). The petition for a writ of certiorari was granted on June 25, 1962 (370 U.S. 935; R. 84). The jurisdiction of this Court rests upon 28 U.S.C. 1257(3).

QUESTION PRESENTED

Petitioners were arrested and convicted for trespass because of a refusal to leave a private amusement park which pursued a policy of racial discrimination. The direction to leave the premises was issued, and the arrest was made, by an officer in the employ of the proprietor and clothed with the authority of the State as a Special Deputy Sheriff.

The question presented is whether, in the circumstances, the State was so closely identified with the act of discrimination that the conviction should be set aside as involving a denial of equal protection of the law in violation of the Fourteenth Amendment.

INTEREST OF THE UNITED STATES

This case has been set down for argument with a number of other cases involving so-called "sit-in" demonstrations. Like the other cases, it involves the rights of Negroes subjected to racial discrimination by private businesses open to the public—a matter of grave concern to the polity of the Nation. See the brief of the United States in Nos. 11, 58, 66, 67, and 71. Because the circumstances differ, however, we are filing a separate brief *amicus curiae* in this case. In obedience to the precept that the Court ought not reach broad constitutional questions if there is a narrower ground of decision, our argument herein is confined to the question set forth immediately above.

STATEMENT**A. STATUTE INVOLVED**

Petitioners were convicted of violating Article 27, Section 577, of the Maryland Code (1957) which provides:

Any person * * * who shall enter upon or cross over the land, premises or private property of any person * * * after having been duly notified by the owner or his agent not to do so shall be deemed guilty of a misdemeanor * * * provided [however] that nothing in this section shall be construed to include within its provisions the entry upon or crossing over any land when such entry or crossing is done under a bona fide claim of right or ownership of said land, it being the intention of this section only to prohibit any wanton trespass upon the private land of others.

B. THE FACTS

This case involves a "sit-in" demonstration at Glen Echo Amusement Park in Montgomery County, Maryland. On June 30, 1960, petitioners, young Negro students, entered the Park through the main gates (R. 6-7; 59). No tickets of admission were required for entry (R. 17¹). Petitioners, with valid tickets that had been purchased for them by white supporters, took seats on the carousel (R. 7-8; 17; 59-60). The carousel was not put in operation and petitioners were approached by one Francis J. Collins (R. 8-9; 61).

¹ Tickets are purchased at individual concessions within the Park (R. 17).

Collins was employed by the Glen Echo management as a "special policeman" under arrangements with the National Detective Agency. At the request of the Park management, Collins had been deputized as a Special Deputy Sheriff of Montgomery County (R. 14-15). He was dressed in the uniform of the National Detective Agency and was wearing his Montgomery County Special Deputy Sheriff's badge (R. 14). Collins directed petitioners to leave the Park within five minutes, explaining that it was "the policy of the park not to have colored people on the rides or in the park" (R. 7-8). Petitioners declined to obey Collins' direction and remained on the carousel for which they tendered tickets of admission (R. 8, 17). Collins then arrested petitioners for trespass in violation of Article 27, Section 577, of the Maryland Code (R. 12).

Collins took this action under the instructions of his employer. He testified that, after seeing the students on the rides, he "went up to Mr. Woronoff [the Park manager] and asked him what he wanted me to do. He said they were trespassing and he wanted them arrested for trespassing, if they didn't get off the property" (R. 7). Mr. Woronoff testified that he "instructed Lieutenant Collins to notify them that they were not welcome in the park, and we didn't want them there, and to ask them to leave, and if they refused to leave, within a reasonable length of time, then they were to be arrested for trespass" (R. 54).

At the Montgomery County Police precinct house, where petitioners were taken after their arrest, Collins preferred sworn charges for trespass against petition-

ers by executing an "Application for Warrant by Police Officer" (R.A., 12). Upon Collins' charge, a "State Warrant" was issued by the Justice of the Peace (R. 13).² Petitioners were tried in the Circuit Court of Montgomery County on September 12, 1966.

At petitioners' trial, Glen Echo co-owner Abram Baker described his directions to Collins in these words (R. 36):

Q. And what specific instructions did you give him with respect to authority to order people off the park premises?

A. Well, he was supposed to stop them at the gate and tell them that they are not allowed; and if they came in, within a certain time, five or ten minutes—whatever he thinks, why he would escort them out.

Q. In the event they didn't see fit to leave at his warning, did you authorize Lieutenant Collins to have these people arrested?

A. Yes.

Q. On a charge of trespass?

A. On a charge of trespass.

Baker also testified (R. 39-40):

Q. Would you tell the Court what you told Lieutenant Collins relating to the racial policies of the Glen Echo Park?

A. We didn't allow negroes and in his discretion, if anything happened, in any way, he

² The original State Warrant, filed on August 4, 1960 (R.B.), alleged that petitioners had refused to leave the Park "after having been told by the Deputy Sheriff for Glen Echo Park" to leave the property. This was replaced by an amended State Warrant of September 12, 1960 (R.C.) which alleged that petitioners had refused to leave "after having been duly notified by an agent of Kebar, Inc." not to remain on the property.

was supposed to arrest them if they went on our property.

Q. Did you specify to him what he was supposed to arrest them for?

A. For trespassing.

Q. You used that word to him?

A. Yes; that is right.

Q. And you used the word "discretion"—what did you mean by that?

A. To give them a chance to walk off; if they wanted to.

Q. Did you instruct Lieutenant Collins to arrest all negroes who came on the property, if they did not leave?

A. Yes.

Q. That was your instructions?

A. Yes.

Q. And did you instruct him to arrest them because they were negroes?

A. Yes.

Q. Did you instruct him to arrest white persons who came on the park property with colored persons?

A. If they were doing something wrong, they are supposed to be arrested.

Q. In other words, your instructions as to negroes was to arrest them if they came into the park, and refused to leave, because they were negroes; and your instruction was to arrest white persons if they were doing something wrong?

A. That is right.

Park Manager Woronoff testified that he was responsible for the conduct of Glen Echo's special police force (R. 54). He stated (R. 55):

Q. Mr. Woronoff, you said, as General Manager of the Park, you were responsible for the conduct of the National Detective Agency officers; is that right?

A. Yes; while they are in our employ at the park.

Q. Does the National Detective Agency make their employees available to you, and you direct them as you see fit?

A. That is correct.

Petitioners were convicted of wanton trespass and ordered to pay a fine (R.F., 72-75). The convictions were affirmed by the Maryland Court of Appeals which rejected petitioners' arguments regarding the applicability of the Maryland statute and found that petitioners' arrest by officer Collins in his dual capacity as agent of Glen Echo and Deputy Sheriff of Montgomery County did not violate the Fourteenth Amendment. On the latter issue, the court said (R. 81-82):

It is true, of course, that the park officer—in addition to being an employee of the detective agency then under contract to protect and enforce among other things, the lawful racial segregation policy of the operator of the amusement park—was also a special deputy sheriff, but that dual capacity did not alter his status as an agent or employee of the operator.

of the park. As a special deputy sheriff, though he was appointed by the county sheriff on the application of the operator of the park "for duty in connection with the property" of such operator, he was paid wholly by the person on whose account the appointment was made and his power and authority as a special deputy was limited to the area of the amusement park.

* * * * *

It follows—since the offense for which these appellants were arrested was a misdemeanor committed in the presence of the park officer who had a right to arrest them, either in his private capacity as an agent or employee of the operator of the park or in his limited capacity as a special deputy sheriff in the amusement park (see Kauffman, *The Law of Arrest in Maryland*, 5 Md. L. Rev. 125, 149)—the arrest of these appellants for a criminal trespass in this manner was no more than if a regular police officer had been called upon to make the arrest for a crime committed in his presence * * *

ARGUMENT

We submit that the convictions should be reversed.

We base this conclusion squarely upon the proposition that when a State delegates its police power to a private business firm the State is responsible under the Fourteenth Amendment for the way in which the private firm exercises the delegated power. Here the police power of Maryland was delegated to Collins, an employee of the Glen Echo Amusement Park, who was paid by the Park, acted for its benefit and was subject to its direction. Clothed with the State's

police power, the proprietors of Glen Echo, acting through Collins, used the police power to enforce a policy of racial segregation. Had the State confined its police authority to law officers acting independently as public officials, the arrests might or might not have been made; but, in either event, the State would be intervening for the first time after the decision to treat petitioners as trespassers had been made and its action, whatever the ultimate effect, might then have been viewed as color-blind. We pass the question whether arrest and prosecution, under such circumstances, would violate the Fourteenth Amendment because, here, the State surrendered its independence of judgment to a private firm and put it into that firm's power to use the State's authority much as it pleased in support of the firm's policies of racial discrimination. Our position is simply that when the decision to segregate and the decision to exercise the delegated police power are joined in the same private hands, the State cannot deny responsibility for either.

1. The attempted eviction of petitioners, their arrests, and the institution of the prosecution were acts of the State of Maryland because Collins, the Park policeman who took these steps, was acting as a public officer of the State of Maryland. See *Williams v. United States*, 341 U.S. 97; *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, 331 U.S. 416, 429. Collins was in uniform and wearing an official badge when he directed petitioners to leave the amusement park. Collins made the arrests as an officer exercising State police power. Whether a private citizen could have requested petitioners to

leave and made the arrests is irrelevant. It was Collins who took the action, and he was acting within the scope of his official duties.

2. Simultaneously Collins was acting as an employee and under the direction of the Park. It was Woronoff, the Park's manager, to whom Collins turned for guidance when petitioners were seen on the carousel. It was on Woronoff's orders that petitioners were arrested. Collins was paid by the Park. It was to the Park, therefore, that he owed his primary loyalty and the Park's interests and wishes would naturally guide him in situations where public officers might exercise discretion.

It is no answer to say that since the Park might have requested petitioners to leave and then summoned police officers from a neighboring police station, Collins' action was no different than any police officer might have taken. There are worlds of difference, in both principle and practice, between State officers who are impartial public servants, obedient only to the law and safeguarding only the public interest, and private policemen paid to do the bidding of private masters in pursuit of their private interests. The essential difference in loyalties and points of view has many practical consequences but there is no better example than the history of industrial relations. For several decades large employers subsidized private detectives and other deputies armed with the authority of the State to execute the employers' wishes during campaigns for union organization, strikes and labor disputes. The conduct of these private policemen is notably different from the conduct of municipal or

State police during labor disputes in subsequent decades. Of the former it was said, "As a class they are overzealous, through their desire to prove to the detective bureaus that they are efficient, and to the railway company that they are indispensable." Frankfurter and Greene, *The Labor Injunction*, p. 72, quoting Judge Amidon in *Great Northern Ry. Co. v. Brosseau*, 286 Fed. 414, 416. See also, *id.*, at pp. 120-121. In recent years State and municipal police forces have found very different ways of preserving the peace, protecting private property and enforcing legal obligations:

Quite different ways of dealing with petitioners' protests against the Park's discriminatory practices might well have been followed if the sovereign authority of Maryland and the duty of serving the interests of his private employer had not been combined in the person of Special Officer Collins. As a practical matter, State and municipal police authorities have and exercise wide discretion in dealing with petty criminal offenses that are essentially private quarrels, especially where public intervention is likely to involve the government in controversial questions essentially unrelated to the preservation of peace and order. It is for the public officials to determine when to resort to arrest, and when to leave the owner to private remedies. The police may file a criminal complaint or they may refuse and insist that any complaint be filed by the interested party. Collins, however, did not seek the guidance of public officials, and the police authority of Maryland was brought to bear without independent public judgment. Had Collins consulted a State or municipal official, a different solution to the "sit-in"

problem might have followed. Collins might have been advised to attempt to conciliate the parties by some action short of arrest and criminal prosecution. He might have tried to persuade the petitioners to leave the premises of their own volition, or to convince the management that making an arrest was in neither the public nor its private interest. Public officials might have sought to reason with the Park before making the police available. If the officer's only loyalty had been to the State, he would, at a minimum, we assume, have cast upon the proprietors the onus of directing petitioners to leave the premises instead of identifying the State's authority with the invidious discrimination by himself directing Negroes to leave an establishment open generally to the public.

3. When the sovereign power of a State is thus combined with the landowner's normal right to decide what licensees may enter his premises and the combined authority is thus exercised to maintain a policy of racial segregation, the State cannot disentangle itself from the discrimination. Having disclaimed the opportunity for independent judgment, the State cannot be heard to say—indeed, no one can know—what the State would have done had it retained that opportunity. In this case, the motivation for the exercise of State power was manifestly the Park's motivation. Since the Park was discriminating on grounds of race, State power was being used for reasons of race, directly and immediately, without other intervention. The order to leave the Park addressed to petitioners by the deputized officer cannot be separated from his employer's direction to give the order. The arrest

cannot be divorced from the direction to arrest. The racial motive for the direction to leave cannot be divorced from the motive for the direction to arrest. And nothing is clearer than that the exercise of State power on grounds of race or color is a denial of the equal protection of the laws.

Respectfully submitted.

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OCTOBER 1962.

Office-Supreme Court, U.S.
FILED

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JOHN F. DAVIS, CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1962

No. ~~20~~ 6

WILLIAM L. GRIFFIN, ET AL.,
Petitioners;

v.

STATE OF MARYLAND,
Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS
OF THE STATE OF MARYLAND

BRIEF OF RESPONDENT

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28 U.S.C. 1257(3)

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1962

No. 26

WILLIAM L. GRIFFIN, ET AL.,

Petitioners,

v.

STATE OF MARYLAND,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS
OF THE STATE OF MARYLAND

BRIEF OF RESPONDENT

OPINIONS BELOW

The opinion of the Court of Appeals of Maryland appears at R. 76-83 and is reported at 225 Md. 422, 171 A. 2d 717. The opinion of the Circuit Court for Montgomery County appears at R. 72-75 but is otherwise not reported.

Attention is also invited to *Griffin v. Collins*, 187 F. Supp. 149, a civil case arising out of substantially the same factual situation as is now before this Honorable Court.

JURISDICTION

The judgment of the Court of Appeals was entered on June 8, 1961. The Petition for Writ of Certiorari was granted on June 25, 1962. The jurisdiction of this Court rests upon 28 U.S.C. 1257 (3).

QUESTION PRESENTED

Whether, consistent with the Fourteenth Amendment, the State of Maryland, under its general statute prohibiting trespass on private property, and acting on the complaint of the owner of a privately-owned and operated amusement park, may convict persons who enter upon such amusement park and who, after demand by the agent of the owner of such private facility, refuse to leave such amusement park?

STATUTES INVOLVED

The Petitioners were convicted of violating Chapter 66 of the Laws of Maryland of 1900, codified as Section 577 of Article 27 of the Annotated Code of Maryland (1957 Ed.), which provides:

"Any person or persons who shall enter upon or cross over the land, premises or private property of any person or persons in this State after having been duly notified by the owner or his agent not to do so shall be deemed guilty of a misdemeanor, and on conviction thereof before some justice of the peace in the county or city where such trespass may have been committed be fined by said justice of the peace not less than one, nor more than one hundred dollars, and shall stand committed to the jail of county or city until such fine and costs are paid; provided, however, that the person or persons so convicted shall have the right to appeal from the judgment of said justice of the peace to the circuit court for the county or Criminal Court of Baltimore where such trespass was committed, at any time within ten days after such judgment was rendered; and, provided, further, that nothing in this section shall be construed to include within its provisions the entry upon or crossing over any land when such entry or crossing is done under a bona fide claim of right or ownership of said land, it being

the intention of this section only to prohibit any wanton trespass upon the private land of others."

The direction to Petitioners to leave the premises was issued on behalf of the owner by one of its agents, a uniformed guard in the employ of a private detective agency under contract to the private owner. The guard, Lieutenant Francis J. Collins, also held an appointment as a Special Deputy Sheriff under the provisions of Chapter 491 of the Laws of Maryland of 1939 (a Public Local Law relating solely to Montgomery County); codified as Section 2-91 of the Montgomery County Code (1955 Ed.), which reads as follows:

"The sheriff of the county, on application of any corporation or individual, may appoint special deputy sheriffs for duty in connection with the property of, or under the charge of, such corporation or individual; such special deputy sheriffs to be paid wholly by the corporation or person on whose account their appointments are made. Such special deputy sheriffs shall hold office at the pleasure of the sheriff and shall have the same power and authority as deputy sheriffs possess within the area to which they are appointed and in no other area."²

STATEMENT

The facts of the case were fairly and adequately summarized by the court below, as follows (R. 76-77):

"* * * William L. Griffin, Marvous Saunders, Michael Proctor, Cecil T. Washington, Jr., and Gwen-

¹ This statute was amended by Chapter 616 of the Laws of Maryland of 1961 (effective June 1, 1961). The amendment eliminated "or city" following "county" in two places and eliminated "or Criminal Court of Baltimore" immediately preceding the words "where such trespass".

² The office of Sheriff in Maryland still carries with it the common law powers of a conservator of the peace. Deputy Sheriffs have such authority as the Sheriff himself could exercise. Hence, the powers of the "Special Deputy Sheriff" under this statute would appear to include the power of arrest. See *Turner v. Holtzman*, 54 Md. 148.

doiyn Greene (hereinafter called 'the Griffin appellants' or 'the Griffins') all of whom are Negroes, were arrested and charged with criminal trespass on June 30, 1960, on property owned by Rekab, Inc., and operated by Kebar, Inc., as the Glen Echo Amusement Park (Glen Echo or park).

The Griffins were a part of a group of thirty-five to forty young colored students who gathered at the entrance to Glen Echo to protest 'the segregation policy that we thought might exist out there.' The students were equipped with signs indicating their disapproval of the admission policy of the park operator, and a picket line was formed to further implement the protest. After about an hour of picketing, the five Griffins left the larger group, entered the park and crossed over it to the carrousel. These appellants had tickets (previously purchased for them by a white person) which the park attendant refused to honor. At the time of this incident, Rekab and Kebar had a 'protection' contract with the National Detective Agency (agency), one of whose employees, Lt. Francis J. Collins (park officer), who is also a special deputy sheriff for Montgomery County, told the Griffins that they were not welcome in the park and asked them to leave. They refused, and after an interval during which the park officer conferred with Leonard Woronoff (park manager), the appellants were advised by the park officer that they were under arrest. They were taken to an office on the park grounds and then to Bethesda, where the trespass warrants were sworn out. At the time the arrests were made, the park officer had on the uniform of the agency, and he testified that he arrested the appellants under the established policy of Kebar of not allowing Negroes in the park. There was no testimony to indicate that any of the Griffins were disorderly in any manner, and it seems to be conceded that the park officer gave them ample time to heed the warning to leave the park had they wanted to do so."

Upon these facts, and after ruling that there was sufficient proof to establish the statutory elements of "due notice" and "wantonness," the court considered the remaining question advanced by Petitioners, viz, whether their arrest and conviction "constituted an unconstitutional exercise of state power to enforce racial segregation". (R. 81). In concluding that there was no such unconstitutional exercise of state power, and in affirming the judgments of conviction, the court below said (R. 81-82):

"* * * It is true, of course, that the park officer — in addition to being an employee of the detective agency then under contract to protect and enforce, among other things, the lawful racial segregation policy of the operator of the amusement park — was also a special deputy sheriff, but that dual capacity did not alter his status as an agent or employee of the operator of the park. As a special deputy sheriff, though he was appointed by the county sheriff on the application of the operator of the park 'for duty in connection with the property' of such operator, he was paid wholly by the person on whose account the appointment was made and his power and authority as a special deputy was limited to the area of the amusement park. See Montgomery County Code (1955), §2-91. As we see it, our decision in *Drews v. State*, 224 Md. 186, 167 A. 2d 341 (1961), is controlling here. The appellants in that case — in the course of participating in a protest against the racial segregation policy of the owner of an amusement park — were arrested for disorderly conduct committed in the presence of regular Baltimore County police who had been called to eject them from the park. Under similar circumstances, the appellants in this case — in the progress of an invasion of another amusement park as a protest against the lawful segregation policy of the operator of the park — were arrested for criminal trespass committed in the presence of a special deputy sheriff of Montgomery County (who was also the agent of the park operator)

after they had been duly notified to leave but refused to do so. It follows — since the offense for which these appellants were arrested was a misdemeanor committed in the presence of the park officer who had a right to arrest them, either in his private capacity as an agent or employee of the operator of the park or in his limited capacity as a special deputy sheriff in the amusement park (see Kauffman, *The Law of Arrest in Maryland*, 5 Md. L. Rev. 125, 149) — the arrest of these appellants for a criminal trespass in this manner was no more than if a regular police officer had been called upon to make the arrest for a crime committed in his presence, as was done in the *Drews* case. As we see it, the arrest and conviction of these appellants for a criminal trespass as a result of the enforcement by the operator of the park of its lawful policy of segregation, did not constitute such action as may fairly be said to be that of the State. The action in this case, as in *Drews*, was also "one step removed from State enforcement of a policy of segregation and violated no constitutional right of appellants."

SUMMARY OF ARGUMENT

The action inhibited by the Fourteenth Amendment is only such action as may fairly be said to be that of the states. The Amendment erects no shield against merely private conduct, however discriminatory or wrongful. Individual invasion of individual rights is not the subject matter of the Amendment. *Shelley v. Kraemer*, 334 U.S. 1, 13; *Civil Rights Cases*, 109 U.S. 3, 11.

A private property owner, such as the operator of a private amusement park, may, consistent with the Fourteenth Amendment, arbitrarily discriminate as to invitees. He has the right, even though he operates his private facility under license from the State, to select his clientele and to make such selection based on color, if he so desires. *Williams v. Howard Johnson's Restaurant*, 268 F. 2d 845

(4th Cir.); *Slack v. Atlantic White Tower System, Inc.*, 181 F. Supp. 124, aff. 284 F. 2d 746.

Individuals have no constitutional right to enter or remain upon private property contrary to the will of the owner. The private owner, on the other hand, is entitled to equal protection of law in maintaining his peaceful possession. This Court, in *Martin v. Struthers*, 319 U.S. 141, 147, referring to state criminal trespass laws, and making specific reference to the Maryland statute here involved, observed:

"Traditionally the American law punishes persons who enter onto the property of another after having been warned by the owner to keep off. General trespass after warning statutes exist in at least twenty states, while similar statutes of narrower scope are on the books of at least twelve states more . . ."

The State's general laws must be applied to all with equal force, regardless of their race, and violation thereof cannot be shielded from state action on account of race. *Bernstein v. Real Estate Commission of Maryland*, 221 Md. 221, app. dismissed 363 U.S. 419. The non-discriminatory application and enforcement of Maryland's criminal trespass law in the present case cannot be considered a type of state action proscribed by the Fourteenth Amendment, even though the private owner's sole reason for excluding negroes from the amusement park may have been, because, they were negroes. *Griffin v. Collins*, 187 F. Supp. 149. The Park's business policy of excluding negroes was neither induced, dictated, or required by any State or local law, policy or custom; nor was it in any way knowingly aided by any action that could fairly be said to be that of the State. Petitioners' arrest and conviction for criminal trespass was not due to or because the State of Maryland desired or intended to maintain this facility as a segregated

place of amusement. It was not only the right, but the duty of the State of Maryland, upon complaint being made to it by the private owner, to act thereon to protect and provide against unlawful entry. In so doing the State was merely allowing the use of its legal remedies as a substitute for force in a civilized community; it was not inducing others to discriminate, nor substituting its judgment for the judgment of the individual proprietor.³

ARGUMENT

Conviction of Petitioners under Maryland's General Statute Prohibiting Wanton Trespass on Private Property Did Not Contravene the Equal Protection Clause of the Fourteenth Amendment to the Federal Constitution.

I.

A PRIVATE AMUSEMENT PARK, THOUGH LICENSED BY THE STATE, MAY CONSTITUTIONALLY REFUSE SERVICE TO NEGROES SOLELY BECAUSE OF THEIR RACE.

At common law, a person engaged in a public calling, such as inn-keeper or common carrier, was held to be under a duty to the general public and was obliged to serve, without discrimination, all who sought service. Equally well settled, on the other hand, is the proposition that operators of other private enterprises, including places of amusement, are under no such common law obligation; and, in the absence of a statute forbidding discrimination, may select their clientele based on color, if they so desire. *Williams v. Howard Johnson's Restaurant*, 268 F. 2d 845 (4th Cir.); *Slack v. Atlantic White Tower System, Inc.*, 181 F. Supp. 124, aff. 284 F. 2d 746; *Griffin v. Collins*, 187

³ The private owner abandoned its policy of not serving Negroes shortly after the conclusion of this case in the lower court. It should also be noted that subsequently thereto the Montgomery County Council enacted an equal accommodations law for Montgomery County, Ordinance 4-120, effective January 16, 1962.

F. Supp. 149; *Mudden v. Queens County Jockey Club*, 72 N.E. 2d 697 (New York), cert. denied, 332 U.S. 761; *Terrell Wells Swimming Pool v. Rodriguez*, 182 S.W. 2d 824 (Texas); *Younger v. Judah*, 19 S.W. 1109 (Missouri); *Goff v. Savage*, 210 P. 374 (Washington); *De La Ysla v. Public Theatres Corporation*, 26 P. 2d 818 (Utah); *Horn v. Illinois Central Railroad*, 64 N.E. 2d 574 (Illinois); *Coleman v. Middlestaff*, 305 P. 2d 1020 (California); *Fletcher v. Coney Island*, 136 N.E. 2d 344 (Ohio); *Alpaugh v. Wolverton*, 36 S.E. 2d 906 (Virginia); *Greenfeld v. Maryland Jockey Club*, 190 Md. 96; *Good Citizens Assoc. v. Board*, 217 Md. 129; and *Drews v. State*, 224 Md. 186; *Garfine v. Monmouth Park Jockey Club*, 148 A. 2d 1 (N.J.); and *State v. Clyburn*, 101 S.E. 2d 295 (N.C.).

This Court, in *Boynton v. Virginia*, 364 U.S. 454 clearly recognized the validity of the foregoing principles when it said that every time a bus stops at a wholly independent roadside restaurant, the Interstate Commerce Act does not require that restaurant service be supplied in harmony with the provisions of that Act. In fact, this Court has refused to hold that where a privately-owned restaurant is involved, in the absence of the general taxpaying public's ownership of the facility, or interstate commerce, that it will extend federal protection against racial discrimination on the basis of the Fourteenth Amendment. *Burton v. Wilmington Parking Authority*, 365 U.S. 715; *Boynton v. Virginia*, *supra*. These recent pronouncements indicate reaffirmance of the long-established law that the owner of private property may be arbitrary and capricious in his choice of invitees, notwithstanding the Fourteenth Amendment; and that that Amendment "erects no shield against merely private conduct, however discriminatory or wrongful." *Shelley v. Kraemer*, *supra*, at page 13. See also *Terminal Taxicab Co. v. Kutz*, 241 U.S. 252.

It being established by the *Civil Rights Cases*, 109 U.S. 3 that the Congress is without power to legislate against such private discrimination as was involved in the present case, this Court cannot (without overruling its prior precedents) accomplish the same result by now holding that the Fourteenth Amendment created a new limitation on the use of private property as developed in the common law. The fact that the private amusement park was required to have a license from Montgomery County in order to operate does not, as contended by Petitioners, prohibit discrimination by the private owner in its use and enjoyment of the licensed facility; nor does the requirement of such license convert the private facility into a public one. *Williams v. Howard Johnson's Restaurant*, *supra*; *Slack v. Atlantic White Tower System, Inc.*, *supra*; *Madden v. Queens County Jockey Club, Inc.*, *supra*; *State v. Clyburn*. See also *Griffin v. Collins*.

II.

THE ARREST AND CONVICTION OF PETITIONERS DID NOT, UNDER THE PARTICULAR CIRCUMSTANCES OF THIS CASE, CONSTITUTE AN UNCONSTITUTIONAL EXERTION OF STATE POWER TO ENFORCE RACIAL SEGREGATION IN THE PRIVATE AMUSEMENT PARK.

Petitioners broadly contend that even if the private proprietor had a right to exclude them from the premises solely on account of their race, the State of Maryland crossed the line of forbidden conduct marked by the Fourteenth Amendment by arresting, prosecuting and convicting them under the criminal trespass statute. Virtually the same argument was advanced and rejected in *Griffin v. Collins*, *supra*, the court there holding:

"Plaintiffs have cited no authority holding that in the ordinary case, where the proprietor of a store, restaurant or amusement park, himself or through his own

employees, notifies the Negro of the policy and orders him to leave the premises, the calling in of a peace officer to enforce the proprietor's admitted right would amount to deprivation by the state of any rights, privileges or immunities secured to the Negro by the Constitution or laws. *Granted the right of the proprietor to choose his customers and to eject trespassers, it can hardly be the law, as plaintiffs contend, that the proprietor may use such force as he and his employees possess but may not call on a peace officer to enforce his rights.*" (Emphasis supplied.)

Though readily conceding that State-imposed racial segregation in the field of recreational activity is proscribed by the Fourteenth Amendment, it is the position of the State of Maryland that "state power" is not being coercibly, and hence unconstitutionally, applied to enforce and abet racial discrimination simply by its exercise to arrest, prosecute and convict under the circumstances of this case. We submit, rather, that the search for unconstitutional state action in this area must be made against the following background, as ably set forth by the United States in its brief *amicus curiae* in companion cases nos. 11, 58, 66, 67, and 71 (this term), at pages 42 and 45:

a State cannot constitutionally prohibit association between Negroes and whites, be it in a public restaurant or elsewhere. On the other hand, to cite an example, if a private landowner should invite all of his neighbors to use his swimming pool at will and then request one of the invitees to leave because of his race, creed or color, the decision would be private and, however unpraiseworthy, not unconstitutional. Furthermore, we take it that there would be no denial of equal protection if the State made its police and legal remedies available to the owner of the swimming pool against any person who came or remained upon his property over his objection. *For, in a civilized community, where legal remedies have been substituted*

for force, private choice necessarily depends upon the support of sovereign sanctions. In such a case, the law would be color-blind and it could not be fairly said, we think, that the State had denied anyone the equal protections of its laws. (Emphasis supplied.)

* * * * *

"It is one thing for the State to enforce, through the laws of trespass, exclusionary practices which rest simply upon individual preference, caprice or prejudice. It is quite another for the State, exercising as it does immeasurable influence over individual behavior, to induce racial segregation and then proceed to implement the acts of exclusion which it has brought about. If the State, by its laws, actions, and policies, causes individual acts of discrimination in the conduct of a business open to the public at large, the same State, we believe, cannot be heard to say that it is merely enforcing, in even-handed fashion, the private and unfettered decisions of the citizen."

As otherwise stated in *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 722, private conduct abridging individual rights does no violence to the equal protection clause unless "to some significant extent" the State "in any of its manifestations" has become involved in it. This court there recognized that to fashion and apply a precise formula for recognition of State responsibility under the equal protection clause would be an "impossible task," and that only by "sifting facts" and "weighing circumstances" could the involvement of a State in private discriminatory conduct, if such existed, be attributed its true significance.

It is not seriously contended that the discriminatory practices of the amusement park were performed in obedience to any positive provision of state law, or induced, required or dictated by any state policy or custom. On the contrary, all of the evidence in the case indicated that the

practice of segregation in the Park was solely the result of the business choice of the private proprietor, catering to the desires and prejudices of his customers. See *Slack v. Atlantic White Tower System, Inc.*, *supra*. We submit, therefore, that the only real issue for decision (and so recognized by the United States in its brief *amicus curiae* filed in this proceeding) is whether the arrest of the Petitioners by Lieutenant Collins, in response to the request of the private amusement park for assistance in enforcing its policy of excluding negroes, constituted state action in violation of the Fourteenth Amendment.

The court below found as a fact from the evidence that Lieutenant Collins was not executing any State authority by virtue of his status as a special deputy sheriff, but was acting solely as the agent of the private property owner in directing petitioners to leave the private amusement park premises. It is nevertheless urged upon this Court on behalf of Petitioners that Collins necessarily acted in his capacity as special deputy sheriff in making the arrests, seemingly reasoning that such must have been so because (a) he was specially appointed a special deputy sheriff upon application of the park management, (b) he was paid by the park, (c) he was in uniform and wearing his state badge at the time he made the arrests, and (d) the application for warrants which he executed after the arrests were on a form entitled "Application for Warrant by Police Officer." We submit that these conclusions are both misleading and inaccurate. Collins was an employee of the National Detective Agency, a private organization incorporated under the laws of the District of Columbia and authorized to provide guard service to its clients. He had been assigned under the guard contract between his employer and the amusement park to be the senior guard

with the title of Lieutenant. That Collins deemed his employer to be the Detective Agency, and not the State of Maryland, or the Park, is abundantly plain from a review of the record. It is equally plain that there is nothing in the evidence to indicate that Collins was engaged at the Park for any reason other than to maintain peace or protect property from damage or theft; and particularly there is nothing in the record to support even a weak inference that he was hired by the amusement park for the sole purpose of excluding Negroes. The only testimony concerning Collins' status as a Special Deputy Sheriff consists solely in the statement, volunteered by Collins, that "I am a Special Deputy Sheriff of Montgomery County, State of Maryland" (R. 14). The record does not disclose upon whose application Collins was deputized. Consistent with the provisions of the statute it could have been at his own request, or at the request of his employer, National Detective Agency, or at the request of the Park management. That Collins was not paid by the Park, but was paid solely by his employer, National Detective Agency, is certain (R. 14). Collins received no pay from the Park or from anyone else for being special deputy sheriff (R. 15). Collins wore the white-coat uniform of the National Detective Agency (and not a uniform of the State of Maryland), and his only indicia of State authority was that he wore, presumably on his uniform, his deputy badge; although there is absolutely nothing in the record to indicate that the Petitioners observed the badge, or knew that Collins was a special deputy sheriff when he arrested them. It is to be noted that Collins, in effecting the arrests, pursued the same procedures as any ordinary citizen in obtaining an arrest warrant from a magistrate, thus indicating that Collins was not exercising the powers of special

deputy sheriff vested in him.⁴ Nor does the mere fact that Collins was given an application for warrant entitled "Application for Warrant by Police Officer" convert otherwise private actions into those of a public official. We submit that on a fair review of the record the only rational conclusion to be drawn is that Lieutenant Collins was not executing any State authority on behalf of the private owner's policy of racial discrimination.

CONCLUSION

For the reasons stated it is respectfully submitted that the judgments of conviction should be affirmed.

Respectfully submitted,

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⁴ Maryland confers on its peace officers the right to arrest without warrant for any misdemeanor committed in the officer's presence, but confines private persons in similar cases to misdemeanors amounting to a breach of the peace. *B. & O. Railroad Co. v. Cain*, 81 Md. 87. Private Detective agencies have no police authority whatsoever under Maryland law. See Sections 75-92 of Article 56, Annotated Code of Maryland (1957 Ed.) regulating the business of private detective agencies.

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AUG 23 1963

STATES, CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1963

No. 6

WILLIAM L. GRIFFIN, ET AL., *Petitioners,*

vs.

MARYLAND, *Respondent.*

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE
STATE OF MARYLAND.

BRIEF FOR PETITIONERS

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ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE
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BRIEF FOR PETITIONERS

Opinions Below

The opinions of the Circuit Court for Montgomery County and of the Court of Appeals of Maryland (225 Md. 422, 171 A. 2d 717) appear at R. 72 and R. 76.

Jurisdiction

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3). The judgment of the Court of Appeals of the State of Maryland was entered on June 8, 1961. The petition for a writ of certiorari was filed on August 4, 1961 and was granted on June 25, 1962. (R. 84). Oral argument

was had on November 5, 1962, and reargument was ordered by this Court on May 20, 1963 (373 U.S. 920).

Question Presented

Whether at a privately-owned amusement facility licensed to serve and catering to the general public, the State may lend its police authority for enforcement of discrimination against Negroes, and, upon refusal of Negro members of the public to leave the premises, may arrest, accuse, prosecute, and convict them of criminal trespass.

Statutes Involved

This case involves the equal protection clause of the Fourteenth Amendment to the Constitution of the United States, and Article 27, Sec. 577 of the Maryland Code (1957) which provides:

"Any person . . . who shall enter upon or cross over the land, premises or private property of any person . . . after having been duly notified by the owner or his agent not to do so shall be deemed guilty of a misdemeanor . . . provided [however] that nothing in this section shall be construed to include within its provisions the entry or crossing over any land when such entry or crossing is done under a bona fide claim of right or ownership of said land, it being the intention of this section only to prohibit any wanton trespass upon the private land of others."

Statement

The group of "sit-in" cases at the 1962 and 1963 terms of court had their origins in Greensboro, North Carolina, on February 1, 1960 in the attempt of Negro citizens to obtain treatment equal to that afforded to

whites in such public accommodations as food, transportation, entertainment and recreation. On that day, four young Negro students at the North Carolina A. & T. College, who had grown increasingly impatient with prevailing practices under which Negro students could not obtain food and refreshment served at local stores, refused to leave a local lunch counter in Greensboro when they were denied a cup of coffee. This modest incident marked the beginning of widespread efforts in a number of states, including Maryland, to open service for Negroes in places of public accommodation. See Pollitt, *Dime Store Demonstrations*, 1960 Duke L.J. 315. One of those efforts, from which this case arose, took place in the summer of 1960 at the amusement park serving the Nation's Capital.

Glen Echo Park, the major amusement facility in the District of Columbia area, is located in Montgomery County, Maryland. The Park is operated by a corporation licensed to do business in the State of Maryland (R. 3; 78, n. 1). In the years up to 1960, Glen Echo Park was frequented by white customers only (R. 46-47), with the exception of Negro maids accompanying white children (as long as they "didn't do anything in the park" (R. 41)). The park offered to the public the usual games and amusement concessions, together with a swimming pool and eating facilities (R. 77).

On June 30, 1960, a number of persons, including petitioners, gathered outside the main entrance of the Park to urge publicly that Negro patrons be permitted to use the Park's facilities and to seek service for Negro patrons by peaceable means (R. 59-71). A picket line protesting racial segregation was set up outside the main entrance to the Park. (R. 62-63). No tickets of admission were required for entry into the Park (R. 17) and petitioners, young Negro students participating in the Glen Echo protest, entered

the Park through the open main gates at about 8:15 p.m. (R. 6-7). While petitioners were generally aware of Glen Echo's long-standing discriminatory policy, they were hopeful that the management would not refuse them service (R. 61-63, 69). Having entered the Park without difficulty, petitioners took seats on the horses and other animals of the carousel and sought to enjoy a merry-go-round ride (R. 7-8), for which they had in their possession valid tickets of admission (R. 17, 59).¹

Petitioners, as we have said, were hopeful that the Park would not refuse them the service which it advertised and rendered to the general public. Their attempts at service were not unreasonable, considering that no tickets were required for admission to the Park itself (R. 17), that none of the signs around the Park indicated any discrimination against Negro customers (R. 60), and that in its press, radio and television advertising in the District of Columbia area the management invited "the public generally" without distinction of race or color (R. 45-46).

It soon developed, however, that petitioners were not going to be able to ride the carousel on which they were seated. While the carousel remained stationary, petitioners were approached by one Francis J. Collins, who ordered them out of the Park (R. 7-8). Collins was employed by the Glen Echo management as head of the special police force at the Park under arrangement with a private detective service, the National Detective Agency (R. 5, 14-15) and was deputized as a Special Deputy Sheriff of Montgomery County on the request of the Park

¹ Friends of the petitioners had purchased these tickets and had given them to petitioners (R. 60). There is no suggestion that the management placed any restriction upon the transfer of tickets to friends and relatives; indeed, it was conceded by an agent of the Park that transfers frequently occurred in his presence (R. 17). No offer to refund the purchase price was made to petitioners (R. 17).

management (R. 14).² Collins was dressed in the uniform of the National Detective Agency and was wearing the *Special Deputy Sheriff's badge representing his state authority* (R. 14). On the orders of and on behalf of the Glen Echo management (R. 7, 54), but wearing the badge of his State office, Collins "gave them five minutes to get off the property" (R. 7), explaining that it was "the policy of the park not to have colored people on the rides, or in the park" (R. 8). Petitioners declined to obey Collins' order, remaining on the carousel for which they tendered their tickets for the ride (R. 8, 17). Having unsuccessfully directed petitioners to leave the premises, and still acting pursuant to his employers' instructions (R. 7, 54) but exercising his police authority (R. A), Collins then arrested petitioners (R. 12) for trespass in violation of Art. 27, Sec. 577 of the Code (R. A). There was no suggestion that petitioners were "disorderly in any manner" or were unwelcome for any reason other than their color (R. 77).

At the Montgomery County Police precinct house where petitioners were taken after their arrest (R. 12), once more acting upon his employers' instructions but exercising his public office, Collins preferred sworn charges for trespass against petitioners by executing an "Application for Warrant by Police Officer" (R. A). Based upon Collins' charge, a "State Warrant" was thereafter issued by the justice of the peace (R. B), leading to petitioners' trial under the Maryland "wanton trespass" statute, Code Art. 27, Sec. 577. Apparently the State had difficulty deciding

² The private force at the Park included at least two employees deputized as Special Deputy Sheriffs (R. 55) pursuant to Montgomery County Code (1955) Sec. 2-91, which provides that "the sheriff, on application of any corporation or individual, may appoint special deputy sheriffs for duty in connection with the property of . . . such corporation or individual; . . . to be paid wholly by the corporation or person on whose account their appointments are made."

whether Collins had been exercising his public or his private powers in enforcing segregation at Glen Echo Park. The State Warrant filed on August 4, 1960 (R. B) alleging that petitioners had refused to leave the Park "*after having been told by the Deputy Sheriff for Glen Echo Park*," to leave the property, was replaced by an Amended State Warrant of September 12, 1960 (R. C) alleging that they had refused to leave "*after having been duly notified by an agent of Kebar, Inc.*" not to remain on the property. The shift from describing Collins as "Deputy Sheriff" to describing him as "an agent of" the owner of the Park was necessitated by the provision of the trespass statute which made entry or crossing over property a crime only "after having been duly notified by the owner or his agent not to do so . . ."

Petitioners' trial in the Circuit Court for Montgomery County on September 12, 1960, elicited the circumstances under which petitioners were warned off Glen Echo premises and arrested and accused of trespass by Collins, acting on the orders of the private management and contemporaneously exercising the powers of his public police office as a Deputy Sheriff. At the trial, Collins, Park co-owner Abram Baker, and Park Manager Woronoff, all elaborated upon the orders given by the management to Collins with respect to his enforcement of racial discrimination. Co-owner Abram Baker admitted that from the first day of Collins' employment, management had instructed him to enforce segregation (R. 37). Baker candidly described the use of his *State-deputized* private employee to enforce racial discrimination:

"Q. Did you instruct Lieutenant Collins to arrest all negroes who came on the property, if they did not leave?

"A. Yes.

"Q. That was your instructions?"

"A. Yes."

"Q. And did you instruct him to arrest them because they were negroes?"

"A. Yes" (R. 39-40).

Deputy Sheriff Collins equally affirmed that he arrested petitioners "because they were negroes," and explained that "I arrested them on order of Mr. Woronoff, due to the fact that the policy of the park was that they catered just to white people..." (R. 16). Park Manager Woronoff also testified that Glen Echo's policy was "to maintain the park on a segregated basis" (R. 53) and that when he learned of petitioners' presence in the Park, "I instructed Lieutenant Collins to notify them that they were not welcome in the park, and we didn't want them there, and to ask them to leave, and if they refused to leave, within a reasonable length of time, then they were to be arrested for trespass" (R. 54).

Petitioners' constitutional objections to the State's participation in and support of racial discrimination, were repeatedly rejected by the trial court (R. 4, 12, 55, 71, 72-75). Petitioners were convicted and fined (R. F. 72-75). The Maryland Court of Appeals affirmed the convictions (R. 76), holding that, under the wanton trespass statute, petitioners' refusal to leave the premises upon instructions of management agent Collins, constituted unlawful "entry or crossing over" the property "after having been duly notified by the owner or his agent not to do so."

The Court dismissed petitioners' arguments that State support of racial discrimination by a public commercial enterprise violated the Fourteenth Amendment, finding the case to be "one step removed from State enforcement of a

policy of segregation" (R. 82). Concerning the segregation policy of Glen Echo Park itself, the Court assumed that no constitutional objection could be raised, and expressly referred to "the lawful segregation policy of the operator of the park" (R. 82). Because of the importance of the issues thus presented and the impact of this Court's ruling upon those issues, which will necessarily have effect beyond the individual cases now before the Court, we enlarge in the Argument on the various legal considerations involved in racial discrimination at public accommodations and its enforcement by the authority of the state.

Summary of Argument

I

Maryland's active support to the racial discrimination of Glen Echo Park transgresses the equal protection clause of the Fourteenth Amendment. What the State has done here falls well within the area of State action interdicted by this Court's rulings in *Shelley v. Kraemer*, 334 U.S. 1, *Barrows v. Jackson*, 346 U.S. 249, and *Burton v. Wilmington Parking Authority*, 365 U.S. 715.

In *Shelley*, and later in *Barrows*, this Court ruled that judicial recognition or enforcement of private undertakings to practice segregation constitutes denial by the state of the equal protection guaranteed by the Fourteenth Amendment. In the instant case it is clear that at least as much as in *Shelley* and *Barrows*, the courts of the State of Maryland have become the means for enforcing racial discrimination.

Indeed, the instant case is far stronger than *Shelley*. For here the State process enforcing discrimination is not merely a civil action for the redress of private wrongs but a criminal action bespeaking a State public policy in

preventing the proscribed conduct. Moreover, whereas in *Shelley* the proprietary interest enforced was the homeowner's choice of neighbors, here discrimination has been enforced not in the private domain of home ownership but in a place of public amusement and accommodation.

Actually, there is far more in the instant case than mere judicial enforcement of racial discrimination—for here the closest interplay existed at every stage between the discrimination at Glen Echo Park and the authority of the State, which was loaned to the owners for the enforcement of their discrimination. Not only the judicial and prosecutory power of the State of Maryland has been employed to enforce discrimination, but the State's police authority was leased to the Glen Echo management on a formalized basis for the continuing administration and enforcement of its discriminatory policy. As regards enforcement of segregation, there was absolutely no severance at any time between public and private authority at Glen Echo Park. See *Burton v. Wilmington Parking Authority*, 365 U.S. 715; *Lombard v. Louisiana*, 373 U.S. 267.

In the deputizing of the private discriminator and in enforcement of his discrimination through arrest, prosecution and conviction of Negroes seeking service, the State has transgressed the guarantee of equal protection as elaborated in this Court's rulings in *Shelley*, *Barrows*, *Wilmington Parking* and *Lombard*. Nor is it any answer to this constitutional showing that states must be empowered to secure the privacy of property owners, or that a potential condition of self-help would arise if this Court were to recognize an area where the State neither protects nor proscribes discriminatory conduct. As regards the contention that application of *Shelley* in the instant cases would leave states helpless to defend the privacy of premises, the answer is that these cases do not involve property which the owner

has reserved for private use. Far from seeking privacy, these establishments are open to and cater to the trade of the public. Where, as here, the proprietor practices no privacy, it is clear that the *only* interest which the State's action is vindicating is the interest in discrimination, and the Fourteenth Amendment precludes State vindication of such an interest. See *Marsh v. Alabama*, 326 U.S. 501, *Public Utilities Comm'n v. Pollak*, 343 U.S. 451, 464; Henkin, *Shelley v. Kraemer*, *Notes for a Revised Opinion*, 110 Pa. L. Rev. 473.

To the argument that proprietors would employ forceable self-help in the area where the State neither protects nor forbids discrimination, we submit that the public record of recent years provides an answering demonstration. It is not the habit of proprietors seeking the trade of the public to engage in the dirty business of self-help ousters of Negroes seeking to give their patronage; rather they rely upon police forces to oblige in the enforcement of the "unwritten law." There is every reason to believe that the removal of state support for discrimination will be the occasion not for the advent of forcible self-help but for the demise of segregation in public accommodations. And all apart from the fact that there is no issue of self-help directly involved in this case and from the overwhelming public record that racial discrimination in places of public accommodation will not outlive the withdrawal of state supports, it should be noted that there is at least grave doubt whether a proprietor could legally engage in self-help to remove Negro would-be patrons.

The Fourteenth Amendment does not permit the State of Maryland to utilize its police powers of enforcement, arrest, accusation and prosecution and its judicial power of trial and conviction to administer and enforce discrimination at public accommodations. The quantum of state ac-

tion in this case far exceeds that which this Court found adequate in earlier cases to invoke the equal protection guarantee and requires a reversal of the judgment below.

II

Under the equal protection clause, the State can neither recognize, countenance, nor protect, a "right" of discrimination against Negroes at public accommodations. The previous argument has proceeded on the assumption that at public accommodations proprietors have a "right" to discriminate and has demonstrated that under *Shelley* and related precedents the State may not lend its enforcement to such a right. Here we urge that actually the State cannot create nor recognize any right to discriminate in the public domain, and that accordingly there is no right amenable to vindication by the State's criminal law.

This Court's 1883 decision in the *Civil Rights Cases*, 109 U.S. 3, has given rise to the assumption that the Fourteenth Amendment concerns itself only with the active misfeasance of the State in matters of race rather than with the State's mere tolerance of racial practices, even in areas of intimate public interest. Actually, the majority in the *Civil Rights Cases* assumed that there was a right to enjoy equal accommodations in public places "which no State can abridge or interfere with", and expressly reserved the question whether discrimination at public establishments "might not be a denial of a right which, if sanctioned by the State law, would be obnoxious to the prohibitions of the Fourteenth Amendment." Nevertheless, the decision did foster the view that the equal protection guarantee does not reach mere State tolerance of racial discrimination. But beginning in the 1940s the "misfeasance" theory began to show its inadequacy in lines of cases (see e.g. *Terry v. Adams*, 345 U.S. 461) where

this Court found the equal protection clause to apply even in the absence of conscious State support to discrimination as such. Recently in *Wilmington Parking* (365 U.S. at 725) this Court found that by reason of the relationship between the State and the public accommodation there involved, an affirmative State obligation arose to assure non-discrimination.

Indeed, we submit that this Court's rulings in *Shelley* and *Barrows*, reflect the concept of the Fourteenth Amendment as a guarantee against tolerance by substantive State law of racial discrimination in the public domain, whether practiced by government officials or private persons. Whether by statute or judicial ruling, the application of State law—contract, tort, property, or statutory trespass—so as to deprive a person because of race of privileges enjoyed by others, is "state action" reached by the Fourteenth Amendment. As thus seen, the true significance of *Shelley* is that the Fourteenth Amendment speaks no less to the state's substantive law of rights and duties than to affirmative state commandments in favor of segregation. The Constitution precludes the state not only from commanding discrimination, but equally from creating or recognizing a legal "right" to discriminate, with the exception of those areas of private concern, such as the home, constitutionally precluded from state intrusion.

In any event, when the State in its executive capacities has involved itself with private proprietors as in the case at bar, then equal protection requires the State to assure non-discrimination in the service of the Negro public. Analysis demonstrates that the State of Maryland is intimately involved in such public accommodations as Glen Echo. In its varied licensing and inspection requirements for the protection of the public interest and welfare, the

State of Maryland has manifested its high concern regarding the operation of Glen Echo. In its many regulatory measures relating to the enterprise, the State further demonstrates its concern for the public interest in the operation of the public accommodation involved. But the State's involvement does not end with licensing, inspection and regulation; in a myriad of ways governments provide assistance to public accommodations. These varying measures of governmental assistance once more demonstrate the State's consciousness of the public interest involved—the enterprise may be privately owned but the interest served is public and receives the active supportive energies of government.

The State has obviously "become involved" in the operation of public accommodations licensed, regulated and supported by its agencies. The "private property" concepts which underlay this Court's refusal in the 1883 *Civil Rights Cases* to give necessary scope to the Fourteenth Amendment's guarantee of equal protection, cannot today remain dispositive of the question whether the State of Maryland may permit public accommodations to discriminate against Negroes. No reason appears why this Court should decline to give controlling significance in equal protection cases to the public interest consideration it finds dispositive in economic due process cases. Cf. *Nebbia v. New York*, 291 U.S. 502. One hundred years after Emancipation, the effort at true emancipation cannot succeed while great public enterprises, operating with the license, approval, assistance and control of the states, remain beyond the constitutional obligation to afford Negro citizens equal participation in the life of the community.

Argument

This case was argued at the last term of court together with other cases involving State prosecutions against Negroes seeking service at public accommodations and facilities. The reargument permits analysis in somewhat more depth, of some fundamental issues which appeared to concern the Court during the argument of the cases last term. Actually, as we continue to urge in this brief, the convictions herein require reversal under the accepted proposition announced and applied by this Court in *Shelley v. Kraemer*, 334 U.S. 1, *Burton v. Wilmington Parking Authority*, 365 U.S. 715, and most recently, in *Lombard v. Louisiana*, 373 U.S. 267, that the Fourteenth Amendment precludes a State from involving itself with private discrimination either through its legislative, executive, or judicial authority (see *infra*, point I). That proposition calls for the reversal of these convictions without necessity of resolving the question whether the discriminatory policy pursued at the public accommodation herein was one which the State could regard as lawful in the absence of active State support. But we urge in addition (see *infra*, point II), an examination of the proposition espoused by the court below and emanating from the 1883 *Civil Rights Cases*, that the owners of licensed premises chartered to serve and catering to the general public have a "right" to practice racial discrimination, and that the State's recognition of such a "right" is not a denial of the equal protection of the law. Should this Court deem it necessary to reach our second point, we urge that a realistic examination of the Fourteenth Amendment must require the conclusion that it obligates States to assure equal access for Negroes at places of public accommodation, and thus the Fourteenth Amend-

ment necessarily precludes the State's imposition of sanctions upon Negroes who peaceably seek the same service accorded by the proprietors to the white public.

I

**The State's Active Support to the Racial Discrimination of
Glen Echo Park Transgresses the Equal Protection
Clause of the Fourteenth Amendment.**

The instant case is one of a number of proceedings challenging state prosecutions of Negro patrons and white associates at places of public accommodation. The first premise of the challenge against the criminal proceedings involved in the pending cases is that such exertions of state power in support of racially discriminatory practices by enterprises serving the public, constitute "state action" forbidden by the Fourteenth Amendment. What the States have done in these cases falls well within the area of state action interdicted by this Court's rulings. See *Shelley v. Kraemer*, 334 U.S. 1, *Barrows v. Jackson*, 346 U.S. 249, and *Burton v. Wilmington Parking Authority*, 365 U.S. 715.

(1) *Judicial Support to Discrimination.* Long before *Shelley*, this Court emphasized that the Fourteenth Amendment's requirement of equal treatment by the state, reaches "state action of every kind"—legislative, executive and judicial. See *Virginia v. Rives*, 100 U.S. 313, 318; *Ex Parte Virginia*, 100 U.S. 339. In *Shelley* and later in *Barrows*, the Court ruled that judicial recognition or enforcement of private undertakings to practice segregation constitutes denial by the state of the equal protection guaranteed by the Fourteenth Amendment. In the instant case it is clear that at least as much as in *Shelley*

and *Barrows*, the courts of the State of Maryland have become the means for enforcing racial discrimination. No more may the State here enforce "private" discrimination by judicial trespass action than it could do so by judicial ejectment action in *Shelley*. We submit that *Shelley* controls the instant case and precludes the affirmance of convictions for "trespass" of persons ordered off premises and arrested and accused "because they were Negroes."³

Indeed, the instant case is far stronger than *Shelley*. Here the State process which enforces racial discrimination is not merely civil process as in *Shelley*, but the substantive criminal law of the State. In contrast to civil process which the State extends to parties for the redress of private wrongs, criminal prohibitions import the existence of a general-public interest in the proscription of the conduct prohibited. Even more so than in *Shelley*, where the State merely opened its courts for private redress, here, in the application of a criminal prohibition, the State is expressing and applying a public policy favoring discrimination.

Moreover, any supposed private interest worthy of state court protection in this case must fall far below the private and property interests which this Court precluded from judicial enforcement in *Shelley*. The asserted private and property interest in *Shelley* was that in the home-owner's choice of his neighbors—an interest which certainly stands high in the traditional respect and protection of the law. By contrast, here the State's process has been made available to enforce discrimination not in the private domain of home ownership, but on a merry-go-round at an amusement park catering to the general public.

³ This was the holding of the Third Circuit under similar factual circumstances, in *Valle v. Stengel*, 176 F. 2d 697.

If, as this Court's *Shelley* ruling held, state courts may not lend their powers to the enforcement of discrimination in home ownership, they may do so *even less* to enforce discrimination at premises licensed for, advertised, and dedicated to the custom of the public.

This is the position espoused before this Court several years ago in a brief amicus for the United States in *Boyn-ton v. Virginia*, 364 U.S. 454. In the Government's Brief before this Court (at p. 17), it emphasized that "The application of a general, nondiscriminatory, and otherwise valid law to effectuate a racially discriminatory policy of a private agency, and the enforcement of such a discriminatory policy by state governmental organs, has been held repeatedly to be a denial by state action of rights secured by the Fourteenth Amendment." Pertinent judicial rulings, the Solicitor General pointed out, demonstrate that "*where the state enforces or supports racial discrimination in a place open for the use of the general public . . . it infringes Fourteenth Amendment rights notwithstanding the private origin of the discriminatory conduct*" (at p. 20).

The position elaborated in *Boyn-ton* is, we submit, the only position which this Court can take consistent with its holdings in *Shelley* and *Barrows*. If the Constitution precludes judicial vindication through civil remedies for a right of private discrimination in the selection of neighbors, then it must at least equally preclude judicial enforcement by criminal law of a restriction of premises catering to the public. Without the necessity of considering the state's nonjudicial involvement in this case in the practice of segregation at Glen Echo Park, it is enough for constitutional purposes for this Court to find that Maryland has impermissibly imposed criminal penalties and prohibitions to support discrimination at a public accommodation.

(2) *Executive Support to Discrimination.* Actually, there

is much more in the instant case than *judicial* enforcement of racial discrimination—for here the closest interplay existed at every stage between the discrimination at Glen Echo Park and the executive authority of the State, which was loaned to the owners for the enforcement of discrimination. Not only the judicial and prosecutory power of the State of Maryland has been employed to enforce discrimination, but the State's police authority was leased to the Glen Echo management on a formalized basis for the continuing administration and enforcement of its discriminatory policy. Deputy Sheriff Collins, not upon the mere request but upon the *orders* of the private management which employed him, and wearing the badge of his public office, informed and instructed petitioners that because they were Negroes they would have to leave the premises. Collins and his associates were thus administering the Park's policy of racial discrimination on a day to day basis.

Indeed, it was officer Collins who created the crime of which petitioners were convicted. His direction to petitioners to leave the premises was a necessary ingredient of the offense under the statute, which is committed only "*after having been duly notified by the owner or his agent . . .*" Then, to add even further state support, still following the orders of his employers but *in his capacity as an officer of the State*, Collins arrested petitioners and filed warrants under oath against them, bringing into play the criminal machinery of the State.⁴ Collins' unassisted

⁴ Collins, who was under the orders of his private employers to accuse petitioners of trespass, did so in his public capacity. This is reflected in the "Application for Warrant by Police Officer" (R. A), filed by Collins on his sworn allegation "that he is a deputy sheriff . . . and as such . . . did observe" the alleged offense, and in the State Warrants (R. B, C) reciting that "complaint hath been made upon the information and oath of Lieutenant Collins, Deputy Sheriff . . ."

While the court below points out (R. 82) that Collins might have filed his accusation in his private capacity, it is significant that he did not.

double play is in sharp contrast to the ordinary Tinker's to Evers to Chance initiation of criminal process.

It could hardly be more obvious, we submit, that as regards enforcement of segregation there was absolutely no severance at any time between public and private authority at Glen Echo Park. The Park's policy of racial discrimination was at all times being administered and enforced by the State through Deputy Sheriff Collins and his colleagues. Here the State of Maryland was not merely enforcing racial discrimination through prosecution in the courts, but was itself administering that discrimination on a day to day basis at the premises of the largest public amusement facility in the District of Columbia area. Cf. *Pennsylvania v. Board of Trusts*, 353 U.S. 230. Indeed, but for the State's ready support, the management might not have discriminated against the Negro patrons. Actually, shortly after that State support was challenged in the instant case and in a Federal suit filed by Negro patrons to bar further arrests at Glen Echo (*Griffin v. Collins*, Civil

Maryland employs an accusatory system in petty offenses based upon the discretionary authority of justices of the peace to arraign persons for trial upon complaint to them of an offense having been committed. Code Article 52, Sections 13 to 25. One who persuades a justice of the peace "in his discretion" (Art. 52, Sec. 23) to issue a state warrant, has procured the trial of the accused in the absence of further affirmative action to amend, or dismiss the warrant, by the justice of the peace. (Art. 52, Sec. 22) or the trial court (Art. 52, Sec. 15, in Montgomery County Art. 52, Sections 25 and 99). That the justice of the peace is influenced in the exercise of his discretionary accusatory power by the fact that a police official is the complainant, is indicated by his maintenance of a separate form of "Application for Warrant by Police Officer" which, unlike the form used by private applicants, requires no listing of other witnesses, is issued in part on the basis of unsworn verbal representations to the justice by the officer of the law, and on his oath that "as a member of the Montgomery County Police Department," he believes the accused guilty (R. A). In these circumstances, it cannot be said that in the exercise of the justice of the peace's discretionary power to accuse petitioners and thus to bring them to trial, it was inconsequential that the complaint made by Collins pursuant to his employers' orders, was in his official capacity as a police officer.

Action No. 12308, D. C. Md. (1960)), the Park abandoned its practice of segregation (see *The Washington Post*, March 15, 1961, p. 1, col. 2).

As this Court recently phrased the presently relevant principle in *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 722, (re-affirmed at the last term in *Peterson v. Greenville*, 373 U.S. 244) the equal protection clause comes into play when "to some significant extent the State in any of its manifestations has been found to have become involved" in private conduct abridging individual rights. The applicability of this rule is clear and direct where the State has loaned its badge of police authority to the private discriminator. Even less can Maryland lease its police badge for discriminatory use here than Delaware could lease its property for discriminatory use in *Wilmington Parking*.

Only this year, the Court decided *Lombard v. Louisiana*, 373 U.S. 267, which appears dispositive on the power of the state to lend its police authority to the maintenance of segregation at public premises. There the public assurances by the New Orleans Mayor and Police Chief to businessmen that police authority would assist in maintenance of segregation constituted impermissible state support to segregation. *Surely an identical result must follow where, as in the present case, the State has not merely promised its police assistance to continued segregation but has actually deputized the proprietor in the daily enforcement of his segregation practice.*⁵

⁵ The court below found Deputy Sheriff Collins' involvement in administering segregation at Glen Echo no different than that of a regular police officer casually called upon for assistance by management (R. 82). While in our view the Constitution precludes either type of police involvement in administering racial segregation at public accommodations, it must be noted that the two situations are not identical. Unlike the policeman requested to make an arrest for trespass, the police power here was under the pay and control of the private management which ordered Deputy

(3) The foregoing considerations, we submit, permit no other resolution of this case than a reversal of the convictions against petitioners. In the deputizing of the private discriminator and in enforcement of discrimination through arrest, prosecution and conviction of Negroes who peaceably sought service, the State has transgressed the guarantee of equal protection as defined and applied in this Court's decisions in *Shelley*, *Barrows*, *Wilmington Parking*, and *Lombard*. Yet there remain certain questions posed during the oral arguments at the last term about the meaning and effect of the result for which we contend. In particular, it has been suggested, *first*, that the owner of a business has an inherent proprietary right of "privacy" from Negro customers, which right the State may properly safeguard and preserve; and, *second*, that if proprietors may continue to discriminate only without the help of the state, then a dangerous condition of forcible self-help would arise in the "no man's land" where the state neither protects nor proscribes discriminatory conduct. We turn to a brief examination of these issues.⁶

Sheriff Collins to administer its discriminatory policy (R. 16). In this commingling of public and private powers at Glen Echo, there was irretrievably surrendered the integrity ordinarily attaching to the policeman's badge. It seems clear (cf. *Steele v. Louisville & Nashville R. Co.*, 323 U.S. 192; *Marsh v. Alabama*, 326 U.S. 501) that the loan of the State's police badge is accompanied by a constitutional prohibition on its use for the enforcement of racial practices.

⁶ A related point which has been suggested during the arguments is that the State's action in convicting petitioners of trespass is "neutral" within the contemplation of the Fourteenth Amendment, since the State courts in applying the law of trespass to petitioners were not racially motivated. But in *Shelley* (334 U.S. 1, 22) this Court rejected the identical argument on the ground that "the power of the State to create and enforce property interest must be exercised within the boundaries defined by the Fourteenth Amendment." In Point II of the argument, we examine at more length the postulate underlying the "neutrality" contention, that the Fourteenth Amendment reaches only the racial misfeasance of the

(a) *Protection of Proprietary Privacy.* It is argued that a right of privacy and racial exclusion inheres in the operator of a public business, which, "right" the State has a legitimate interest to safeguard and preserve. But this case does not involve the privacy of the home, or of premises at which the owner has sought to bar the presence of the public at large. Far from seeking privacy, Glen Echo Park is open to and caters to the trade of the public. This Court has had occasion to emphasize precisely this distinction. In *Marsh v. Alabama*, 326 U.S. 501, the Court ruled that the exertion of state criminal authority on behalf of a proprietor's restriction on the liberties of a member of the general public on his premises was precluded by the Fourteenth Amendment. As the Court pointed out (at 505-506): "The State urges in effect that the corporation's right to control the inhabitants of Chickasaw is coextensive with the right of a homeowner to regulate the conduct of his guests. We cannot accept that contention. Ownership does not always mean absolute dominion. The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it." And in *Public Utilities Com'n v. Pollak*, 343 U.S. 451, 464, the Court dismissed the contention that the Constitution secures to a passenger on a public vehicle "a right of privacy substantially equal to the privacy to which he is entitled in his own home." Privacy, said the Court, "is substantially limited by the rights of others when its possessor travels on a public thoroughfare or rides in a public conveyance."

State and provides no affirmative obligation upon the State to protect the Negro public in its enjoyment of public services and accommodations. We urge there that there is in fact no "right" to discriminate in the public domain amenable to "neutral" protection by the substantive law of the State (see *infra*, pp. 27 to 32).

This Court has long recognized the attenuation of personal and proprietary privacy when asserted in areas of public interest and concern. Thus, the proprietor of an apartment house, but not the proprietor of a town, can exclude leaflet distributors from privately owned premises. Compare *Hall v. Commonwealth*, 335 U.S. 875 with *Marsh v. Alabama*, 326 U.S. 501. Similarly, the city can protect the citizen's privacy in his living room, but not on the public street. Compare *Beard v. Alexandria*, 341 U.S. 622 with *Cantwell v. Connecticut*, 310 U.S. 296. Private ownership of premises is not dispositive on the right to exclude unwanted and trespassing union organizers. *Republic Aviation Corp. v. NLRB*, 324 U.S. 793. The right to privacy and association must yield when the association wields quasi-public functions. Compare *James v. Marinship Corp.*, 25 Cal. 2d 721, 155 P. 2d 329, with *Ross v. Ebert*, 275 Wisc. 523, 82 N.W. 2d 315. See also *Terry v. Adams*, 345 U.S. 461.

Glen Echo Park is a licensed business enterprise owned and operated by corporations chartered by the State of Maryland. It caters to the general public as the major amusement park in the District of Columbia area and none of its numerous advertisements through various means of public communication reflected any discrimination against Negro members of the public and no signs around the Park proclaimed any restriction upon the custom of Negro patrons. These factors underline the critical consideration in the instant case that the State's power has been invoked to enforce not personal privacy but public discrimination—to assist a business catering to the general public in its refusal of service to Negro members of that public. But he who seeks privacy must practice privacy. To the argument that rights of "privacy" must be given predominant standing here, the simple answer is that there is no privacy to be protected in a place of public accommo-

dation catering to thousands of amusement-seekers.

Whether and to what extent the state may enforce racial discrimination at premises which the owner has not opened to public use is a question not now necessary for decision. In that situation Constitutional rights of private possession and use might be invoked as the justification for the state's protective activism. See Henkin, *Shelley v. Kraemer, Notes for a Revised Opinion*, 110 Pa. Law Review 473. *But here where the proprietor practices no privacy, it is clear that the only interest which the State's criminal action can be said to vindicate is in maintenance of segregation at public accommodations, and such an interest cannot survive the Fourteenth Amendment's stricture of equal protection.*⁷

(b) *Segregation By Forcible Self-Help.* To the suggestion that the prohibition of state support to segregation at public accommodations would create a dangerous no man's land, where self-help would replace law and

⁷ Far from dealing with a property-owner seeking privacy, here we have a state-licensed enterprise of public accommodation which has been the beneficiary of state support in its discrimination. Thus it would hardly be argued that a state may license public accommodations expressly to serve the white public. Yet, while the State's license here may in form be neutral, when the State through its courts enforces racial segregation at the licensed premises, then in effect the State has licensed and authorized an enterprise to provide accommodations to the white public alone.

This the State clearly may not do. As Mr. Justice Douglas stated in his concurring opinion in *Garner v. Louisiana*, 368 U.S. 157, 184: "I do not believe that a State that licenses a business can license it to serve only whites or only blacks or only yellows or only browns. Race is an impermissible classification when it comes to parks or other municipal facilities by reason of the Equal Protection Clause of the Fourteenth Amendment. By the same token, I do not see how a State can constitutionally exercise its licensing power over business either in terms or in effect to segregate the races in the licensed premises. The authority to license a business for public use is derived from the public. Negroes are as much a part of that public as the whites. A municipality granting a license to operate a business for the public represents Negroes as well as all other races who live there. A license to establish a restaurant is a license to establish a public facility and necessarily imports, in law, equality of use for all members of the public."

order, there are at least two answers. Actually, it may be that proprietors of public accommodations have no right to discriminate against Negroes, even without the active assistance of the state—this is the issue to which the second point of this brief (*infra*, pp. 27 to 41) is addressed. Here we would merely note that there is a serious Constitutional question whether the state may either enforce or permit racial segregation at accommodations licensed for or catering to the general public.

In any event, the public record of recent years demonstrates the unlikelihood of self-help as a means for perpetuating the discrimination which proprietors have heretofore practiced with the assurance of the state's ready assistance. It is not the habit of proprietors seeking the trade of the public to engage in the dirty business of self-help ousters of Negroes seeking to give their patronage; rather they rely upon police forces to oblige in the enforcement of the "unwritten law." The recent wholesale abandonment of racial practices of the business community in many Southern localities, demonstrates that these practices are less the product of public attitudes or business necessity than the vestigial remains of former conditions, succored by the willingness of public authorities to enforce segregation. There is every reason to believe that the removal of state support for discrimination will insure the demise of segregation in public accommodations.

Prior to the first sit-in of February, 1960, lunch counters throughout the South denied normal service to Negroes. Six months later, lunch counters in sixty-nine cities had abandoned discriminatory practices (*The New York Times*, August 11, 1960, p. 14, col. 5); by October of 1960, the number of recently desegregated municipalities had mounted to more than one hundred (*The New York Times*, Oct. 18,

1960, p. 47, col. 5). During 1961 and 1962, desegregation steadily continued,⁸ and in 1963 wholesale abandonment of segregation has been the national pattern.⁹

In the instant case, no possible difficulty could arise from this Court's invalidation of State support for segregation at Glen Echo.¹⁰ After these cases were tried, the Park abandoned its prior racial practices in 1961 (see *The Washington Post*, March 15, 1961, p. 1, col. 2); Montgomery County adopted a public places law (Ordinance 4-120, adopted by County Council, January 16, 1962), and recently so did the Maryland Legislature. See 8 R.R.L.R. 268. Unquestionably, an element in the management's abandonment of discrimination was petitioners' challenge to the State's enforcement of discrimination. The national evidence equally demonstrates that state enforcement alone provides the essential buttress for continued racial discrimination at places of public accommodation.

The Fourteenth Amendment does not permit the State of Maryland to utilize its police powers of enforcement, arrest, accusation and prosecution and its judicial powers of trial and conviction to administer and effectuate racial discrimination at a facility catering to the general public. The quantum of state action here far exceeds that which this

⁸ See e.g. *The New York Times*, Feb. 7, 1962, p. 40, col. 5 (Memphis); *The Washington Post*, April 9, 1962, p. 5, col. 2 (Houston); *The Washington Post*, Sept. 13, 1962, p. 18, col. 1 (New Orleans).

⁹ See *The Washington Post*, July 19, 1963, p. 4.

¹⁰ As the trial judge himself observed (R. 74):

"If the Court of Appeals of Maryland decides that a negro has the same right to use private property as was decided in the school cases, as to State or Government property, or if the Supreme Court of the United States so decides, you will find that the places of business in this County will accept that decision, in the same manner, and in the same way that public authorities and the people of the County did in the School Board decision."

Court found adequate to bring into play the equal protection clause in earlier cases. We submit that under the Fourteenth Amendment Maryland cannot convict Negro youngsters of criminal trespass merely because they have sought to ride the merry-go-round in a place of public accommodation.¹¹

II

Under the Equal Protection Clause, the State Can Neither Recognize, Countenance, Nor Protect a "Right" of Discrimination Against Negroes at Public Accommodations.

The argument in the previous section has examined State involvement on the general premise that the equal protection clause is invoked by forms of active State conduct which sanction, compel, or enforce discrimination. Most of the Fourteenth Amendment racial cases which have come before this Court have in fact involved voli-

¹¹ State criminal statutes, particularly where First Amendment rights might be unduly impeded by uncertainty in the ambit of the state's proscription of conduct, must avoid vagueness in the definition of a criminal act. *Lanzetta v. New Jersey*, 306 U.S. 451; *Cantwell v. Connecticut*, 310 U.S. 296; *Winters v. New York*, 333 U.S. 507; *Smith v. California*, 361 U.S. 147; *Edwards v. South Carolina*, 372 U.S. 299; *Wright v. Georgia*, 373 U.S. 284. The enforcement of this Maryland criminal trespass statute against these petitioners runs counter to these precedents, for it subjects petitioners to punishment without adequate prior notice that their conduct transgressed the State's criminal proscription. The statute forbids "entering or crossing over" private property after notification not to do so. The Maryland Court of Appeals found the statute applicable to petitioners, who were warned-off the property only when actually sitting on the carousel in making their First Amendment protest. While the court below deemed petitioners' failure to leave the premises synonymous with "entering or crossing over" the premises, its sole authority for such a construction was a recent North Carolina Supreme Court ruling (R. 89). Certainly, in the absence of a prior Maryland construction of this criminal trespass statute, the "entering or crossing over" language was not adequate warning to sustain punishment of persons making peaceable public protest simply by remaining on an amusement concession for which they had tickets of admission.

tional and active governmental support to discrimination as such; there have been few occasions for resolving the impact of the Fourteenth Amendment where the state does not compel but merely tolerates discrimination. Some have accordingly come to view equal protection as a guarantee only against the racial misfeasance of the state. Thus, the court below assumed that no constitutional question arises merely from the state's acceptance and recognition of a "lawful policy of segregation" at a place of public accommodation--and having postulated a "right" of discrimination, it found no fault with Maryland's vindication of that right through criminal trespass sanctions. In the previous analysis, we have accepted *arguendo* the premise entertained by the court below that proprietors have a right to discriminate at public accommodations, and have urged that nevertheless the State may lend no enforcement to the exercise of such a right. Here we urge that the premised "right" to discriminate at public accommodations is itself erroneous--that the State cannot create or recognize a right to discriminate against the Negro public, and that accordingly there is no "right" for the State's criminal law to vindicate.¹²

(1) Is it truly the law that equal protection proscribes only state enforcement of racial discrimination? Does the guarantee of "equal protection" import no affirmative obligation of the state to assure non-discriminatory treat-

¹² What is relevant here as a constitutional defense to Maryland's criminal prosecution is that the owner of a public accommodation has no "right" to discriminate against Negroes and in the absence of such a "right" there is no legitimate predicate for the State's criminal action against Negroes who seek service. It is our view, as we develop herein, that the same considerations which make it a violation of the Constitution for the State to recognize a proprietor's "right" to discriminate, also give the Negro an affirmative "right" to service at public accommodations. The Constitution, we submit, not only permits Negro members of the public to sit on the carousel free of State interference, but also requires the State to assure them equal access and service at such accommodations.

ment in any of the areas of public life where the state is otherwise intimately concerned and involved? If proprietors have the "right" to discriminate against Negroes at public accommodations, is it not the substantive state law from which that right is derived, and if so, may a state create and recognize a proprietary right to discriminate in a public calling and in the public domain?

This Court's 1883 decision in the *Civil Rights Cases*, 109 U.S. 3, first gave rise to the assumption that the Fourteenth Amendment concerns itself only with the active misfeasance of the state in matters of race, and not with its nonfeasance. The language of this Court's ruling has been taken to mean that persons may engage in racial discrimination in the operation of public accommodations, and that the Fourteenth Amendment does not require the state to concern itself with such conduct. Actually, closer reading of the *Civil Rights Cases* decision indicates that more has been attributed to its holding than it contained. For this Court held only that that Congress had exceeded the ambit of the Fourteenth Amendment in legislation which spoke directly to the proprietors of accommodations, without directing itself in any way to the intermediate Fourteenth Amendment responsibility of the state. Certainly, there was not then before the Court the question whether the Fourteenth Amendment is breached when a state has failed to protect the Negro from discrimination in access to public accommodations. On the contrary, the Court took pains to point out (pp. 19, 21) that the case was resolved "on the assumption that a right to enjoy equal accommodation and privileges in all inns, public conveyances, and places of public amusement, is one of the essential rights of the citizen which no State can abridge or interfere with," and that the Court was not presented with the issue whether denial of equal service at such establish-

ments "might not be a denial of a right which, if sanctioned by the state law, would be obnoxious to the prohibitions of the Fourteenth Amendment."

Notwithstanding the narrow holding of its 1883 ruling, the language of the majority in the *Civil Rights Cases*, which gave pre-emptive emphasis to the consideration that an accommodation is privately owned, has fostered through succeeding years the assumption that equal protection begins and ends with an active state command in favor of discrimination, and does not, even in areas of public interest and concern, reach mere tolerance of racism by the law of the state. But in the early 1940s the "misfeasance" theory began to show its inadequacy. In the adjudication of a line of racial primary cases culminating in the ruling in *Terry v. Adams*, 345 U. S. 461, this Court held that the Fourteenth Amendment reaches "private" discrimination by those who exercise authority from the state or in the area of the state's direct concern. As the Court recently explained in its *Wilmington Parking* decision, there are circumstances where by reason of the confluence of governmental and private authority (cf. *Marsh v. Alabama*, 326 U. S. 501), the affirmative obligation devolves upon the state to assure equality of treatment regardless of race. Concerning the practice of discrimination at a state-connected public accommodation, this Court referred to the responsibility of the State to assure non-discrimination at the premises, and stated that "no state may effectively abdicate" such responsibilities, either by "ignoring them or by merely failing to discharge them whatever the motive may be" (365 U. S. at 725). These authorities indicate that this Court has already recognized that the State may transgress the obligation of equal protection by its mere countenancing of discrimination in areas of public concern.

(2) Indeed, we submit that this Court's rulings in *Shelley* and *Barrows* necessarily reflect the concept of the Fourteenth Amendment as a guarantee against tolerance by state substantive law of racial discrimination, whether practiced by Government or private citizenry. As this Court expressly stated in *Shelley*, the Fourteenth Amendment inhibits in the area of race "the power of the State to create and enforce property interests." Under this view, the state may neither create, enforce, recognize, nor tolerate a "right" to discriminate in the public domain. Neither common law nor statute can be constitutionally applied in a manner which would validate racial discrimination. Whether by statute or judicial ruling, the application or enforcement of state law,—contract, tort, property or statutory crime of trespass—in a manner which would deprive a person solely because of race of rights or privileges enjoyed by other persons, is "state action" which violates the Fourteenth Amendment.

As thus seen, the true significance of *Shelley* is not its proscription on state enforcement of a supposed "right" to discriminate. Rather, it is grounded on the view that the Fourteenth Amendment speaks no less to the state's substantive law of rights and duties than to affirmative state commandments in favor of segregation. With the exception of those areas of private right such as the home, which are constitutionally precluded from government intrusion (see Henkin, *Shelley v. Kraemer*, *Notes for a Revised Opinion*, 110 Pa. Law Review 473), state law which recognizes and gives standing to a "right to discriminate" on the basis of race, offends the equal protection guarantee. This, in our view, is the answer to the question voiced by Mr. Justice Black at the arguments last year, whether if proprietors have a right to discriminate at their establishments the state is precluded from giving

them protection in that right. The Constitution precludes the state not only from enforcing a right to discriminate, but equally from creating or recognizing such a right in the public domain. An individual need not hold himself out to serve the general public, but, if he does, the State under the Fourteenth Amendment may not recognize his "right" to exclude from his offer to serve the public any part thereof solely on grounds of race.

(3) But even in the absence of the suggested assimilation of the state's law of substantive rights to the concept of "state action," we would urge that with respect to the service of Negroes at places of public accommodation the state is so intimately concerned that it can neither compel nor permit racial discrimination. Those who operate accommodations catering to the public must, in our view, be charged by the state with the minimal trust of serving the public without racial discrimination. In *Garner v. Louisiana*, 368 U.S. 157, 176 (see also *Lombard v. Louisiana* 373 U.S. 267), Mr. Justice Douglas in a concurring opinion, pointed to the intimate contacts between the state and a restaurant authorized to cater to the general public. He concluded (p. 182) that "those who run a retail establishment under permit from a municipality operate, in my view, a public facility in which there can be no more discrimination based on race than is constitutionally permissible in the more customary types of public facility." We submit that no other conclusion can properly be reached, and that if the Court should review the question, it must rule that Maryland cannot permit Glen Echo to discriminate against petitioners because of their color and refuse them service at its premises.

The constitutional mandate for applying equal protection guarantees to places of public accommodation, was

brilliantly set forth eighty years ago in Justice Harlan's historic dissent in the *Civil Rights Cases*, 109 U.S. 3. A review of the status of such establishments under law and in the social order led Justice Harlan to the view that the moving purpose of the Emancipation Amendments would be subverted were their ambit to exclude carriers, inns and similar public accommodations:

"In every material sense applicable to the practical enforcement of the Fourteenth Amendment, railroad corporations, keepers of inns and managers of places of public amusement are agents or instrumentalities of the State, because they are charged with duties to the public, and are amenable, in respect of their duties and functions, to governmental regulation. It seems to me that, within the principle settled in *Ex parte Virginia*, a denial, by these instrumentalities of the State, to the citizen, because of his race, of that equality of civil rights secured to him by law, is a denial by the State, within the meaning of the Fourteenth Amendment. If it be not, then that race is left, in respect of the civil rights in question, practically at the mercy of corporations and individuals wielding power under the States" (109 U.S. 3, 58-59).

Justice Harlan's broad concept of the Fourteenth Amendment is not dissimilar from that evidenced by the more recent decisions of this Court. Beginning with the landmark voter discrimination cases (*Nixon v. Herndon*, 273 U.S. 536; *Nixon v. Condon*, 286 U.S. 73; *Smith v. Allwright*, 321 U.S. 649) and going on through *Steele v. Louisville & Nashville R. Co.*, 323 U.S. 192, and a series of subsequent rulings, this Court has applied the rule that when government has its "thumb on the scales," private conduct

may become infused with the requirement of equal treatment. Such infusion has been found by the Court in areas of contracts (*Steele, supra; Shelley, supra*), transportation (*Henderson v. United States*, 339 U.S. 816), education (*Pennsylvania v. Board of Truats*, 353 U.S. 230; and see *Cooper v. Aaron*, 358 U.S. 1, 19) and most recently in the case of a state-assisted public accommodation (*Burton v. Wilmington Parking Authority*, 365 U.S. 715). In the case last named, the Court warned that the equal protection requirement would apply when "*the State in any of its manifestations has been found to have become involved*" with a private enterprise engaging in racial practices.

(4) In the present more refined formulation of the degree of state action necessary to bring "private action" within the reach of the Fourteenth Amendment, we respectfully submit that the State in many of its manifestations is indeed involved in public accommodations. Current analysis likewise demonstrates that the State is intimately involved in public accommodations, which are licensed to perform valued public services upon a showing of capacity to serve the public interest, and are governmentally regulated and supported to further the serious public concern in the availability of the services provided. This is illustrated by a brief review of the applicable statutes of Maryland respecting the operation of an establishment such as Glen Echo Park:

(i) *License*. Under Section 15-7 of the Montgomery County Code (1960), it is made "unlawful for any person to hold in the county any picnic, dance, soiree or other entertainment for gain or profit to which the general public are admitted," without first having obtained a permit or license. By Section 15-8, the County Council is empowered to issue such permit or license upon payment of a reasonable fee, and to adopt "such rules and regulations in connection with such permit, license and fee as

are necessary to protect the public health, safety and welfare." By Section 15-11, the Council is empowered to "inspect, license, regulate or limit as to location within the limits of the county any place of public amusement, or recreation . . . and in order to safeguard the public health, safety, morals and welfare, to pass rules, regulations or ordinances . . ."

In Chapter 75 of the Montgomery County Code the Council has promulgated specific regulations (in addition to general rules applicable to matters such as health, fire and sanitation) relative to the licensing and operation of amusement parks, theatres, dance halls, restaurants, cafes, inns, taverns, public swimming pools, etc. These rules prescribe the hours of operation (Section 75-1, 75-2) and other detailed matters. Operation without a license of "amusement parks operated for profit" (Section 75-9) is forbidden (Section 75-5, 75-16). Licenses are issuable by the Director of the Department of Inspection and Licenses (Section 75-6) two weeks after a copy of the application has been published in a newspaper of general circulation (Section 75-7). But no amusement park license may be granted until the park submits proof "of sufficient financial responsibility or adequate liability insurance coverage, to protect the public using the park" (Section 75-9). Payment of the license fee "entitles the operator of the amusement park" to operate all amusement devices not prohibited by law (Section 75-9). In these licensing and inspection requirements for the protection of the public interest and welfare, the State has manifested its high concern regarding the operation of the amusement accommodations involved. But even after the issuance of the State's approval for the operation of the establishment, continuing State concern is reflected in the system of regulation in the public interest.

(ii) *Regulation.* Licenses issued expire within one year (Section 75-10). They may be denied, revoked or suspended if the enterprise "constitutes a detriment, is injurious to, or is against the interests of, the public health, safety, morals or welfare" (Section 75-11). While hearings are provided in cases of revocation and suspension, there is specific authority for the summary closing of the premises to prevent manifest nuisance or danger (Section 75-13). The County reserves its rights of visitation and inspection at the premises (Section 75-15). In these ways, by continual vigilance and inspection, the State further demonstrates its concern for the public interest in the operation of the public accommodation involved.

(iii) *Support.* In the creation and operation of its enterprise, the amusement facility also receives a variety of significant governmental supports. The State first gives it corporate existence and recognition, permitting it to exercise the attributes of a natural person with the privilege of limited liability. Then, with the grant of a permit to operate a public business, the State authorizes the facility to cater and advertise to the general public.

But the State's support does not end with the issuance of corporate charters and public licenses. In a myriad of ways governments provide assistance to public accommodations. Special supports are made available through urban renewal, fair trade protections, anti-trust laws, tax benefits and the like. And assistance is given by outright subsidies and supportive services of Departments of Commerce and Labor. Then, too, there is the vast area of local government assistance—the special zoning and license dispensations, the police protections, and the many daily manifestations of local concern for adequate public facilities. Thus, Glen Echo Park is reached by two public highways paved and repaved from public funds; large numbers

of private cars in and out of the Park create traffic congestion which must be handled by State, local, and Park Police; the Park's thrill rides and attendant noises exist only by relaxation of State laws relating to public nuisances; and, of course, this entire case arises from the action of a State-deputized private employee of the Park. These varying measures of governmental assistance once more demonstrate the State's consciousness of the public interest involved—the enterprise may be privately owned but the interest served is public and receives the active supportive energies of government.

(5) In view of these manifold contacts just reviewed, can it possibly be said that the State has not "become involved" in the operation of public accommodations licensed, regulated, and supported by its agencies? We submit that the points of State involvement are too many and too intimate to allow an affirmative answer in the light of twentieth century relationships between government and public enterprise. Cf. *Public Utilities Com'n v. Pollak*, 343 U.S. 451, 462.¹³ But as important as their "state involvement" aspect, these contacts also express the State's recognition of the constitutionally relevant fact that public accommodations are clothed with a vital public interest. Once that fact be recognized, as urged by Justice Harlan in 1883,

¹³ That the community interest is intimately involved in the service of the citizens at public accommodations is evidenced by the common law of inkeepers, more particularly defined today in the laws of some thirty states which prohibit racial discrimination at public places. Moreover, Southern states have also evidenced their concern with access to service at public accommodations, through the variety of segregation laws in force since the latter part of the last century, which defined the basis for serving the Negro and white public at such establishments. Recently, Maryland enacted a public accommodations law which reverses the former legislative commandments of segregation. See 8 R.R.L.R. 268. Both in the former code of segregation and in the present law of integration, Maryland confesses the State's intimate concern with public access to services and accommodations catering to the custom of the public.

then vital constitutional principles come into play—those which this Court emphasized in a line of adjudications foreshadowed in *Munn v. Illinois*, 94 U.S. 113, and brought to full standing in *Nebbia v. New York*, 291 U.S. 502, and succeeding due process rulings. In the resulting test of government controls against the guarantees of due process, this Court's inquiry no longer ends with the discovery that the enterprise is private, but proceeds on to the question whether the public interest warrants the restraint imposed. This Court has thus definitively accepted Mr. Justice Holmes' view (*Lochner v. New York*, 198 U.S. 45, 75) that "the Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics." The "laissez faire" concept which underlay this Court's 1883 refusal to give necessary scope to the Fourteenth Amendment's guarantee of equal protection, cannot today remain dispositive of the pending question.

No reason appears why this Court should decline to give controlling significance in equal protection cases to the public interest consideration it finds dispositive in economic due process cases.¹⁴ Considerations of the highest order of public interest are involved in the availability of public services and accommodations without discrimination or segregation—their magnitude is measured by the cataclysmic struggle in which they were forged and the great Emancipation Amendments in which they are enshrined. Yet as long as these guarantees are thought to permit the wholesale denial to Negroes of public accommodations and the amenities of daily life which they provide, the Amendments remain, in Justice Harlan's prophetic words, merely "splendid baubles." One hundred years after Emanci-

¹⁴ Cf. St. Antoine, *Private Racial Discrimination*, 59 Mich. L. Rev. 993, 1008-1016.

pation there is presented in America the spectacle of apartheid communities where Negro citizens are neither truly free nor nearly equal. True, commendable progress is being made to render them free and equal "before the law"; but the effort at true emancipation cannot succeed while great public enterprises operating with the license, approval, assistance and control of the state, remain beyond the constitutional obligation to afford Negro citizens equal participation in the life of the community.

(6) *Plessy* and the *Civil Rights Cases* are twin rulings born in an era of retreat from the guarantees of the Emancipation Amendments following the famous Hayes-Tilden political compromise of 1877.¹⁵ After decades of damage to the moving purpose of those guarantees, this Court was induced to abandon the "separate but equal" doctrine, to restore the integrity of governmental involvement in public schooling and to remove a major obstacle to the achievement of a desegregated society. As history has proved Justice Harlan correct in *Plessy*, it has also corroborated his forebodings in the *Civil Rights Cases* about a ruling

¹⁵ A leading scholar of the post-Civil War history, Professor C. Vann Woodward, has noted the relationship of the 1883 ruling in the *Civil Rights Cases* to the 1877 compromise:

"So far as the historical Negro question was concerned, the Compromise of 1877 proved to be a more lasting settlement than had the Compromise of 1850 and those that preceded it. The earlier settlements had been superseded or repudiated in relatively short order. There were no serious infringements of the basic agreements of 1877—those regarding intervention by force, respect for state rights, and the renunciation of Federal responsibility for the protection of the Negro. In 1883 the Supreme Court pronounced the Civil Rights Act unconstitutional. The decision constituted a sort of validation of the Compromise of 1877, and it was appropriate that it should have been written by Justice Joseph P. Bradley, the 'Fifth Judge' of the Electoral Commission." Woodward, *Reunion and Reconstruction, The Compromise of 1877 and the End of Reconstruction* (1951), 245.

which, under the guise of "proprieters' rights", had the effect of carving from the promise of equal protection the area of public life dominated by "corporations and individuals wielding power under the States" to supply public services and accommodations.

Public segregation in the United States is the stepchild of the pre-Civil War slavery and the post-Civil War segregation laws. It has been fostered and maintained through a consistent and total interplay between those in the real community who hold commercial and economic power and elements of the political community of the states (legislatures, courts, executive officials and particularly the police). As Mr. Justice Douglas pointed out in his concurrence in *Lombard v. Louisiana*, 373 U.S. 267, a society which permits exclusion of Negroes at its establishments of public accommodation, and indeed lends its legal sanctions to such exclusion, is practicing *apartheid* no less than the State which directly decrees and compels segregation in public life. Certainly, the Framers of the Emancipation Amendments did not anticipate a century of segregation of Negroes from equal participation in community life.¹⁵ Yet that has been the history following this

¹⁵ This point was aptly put by Senator Sumner during the debate on an 1875 Civil Rights Act amendment. Senator Sumner stated:

"Each person, whether Senator or citizen, is always free to choose who shall be his friend, his associate, his guest. And does not the ancient proverb declare that a man is known by the company he keeps? But this assumes that he may choose for himself. His house is his 'castle'; and this very designation, borrowed from the common law, shows his absolute independence within its walls; nor is there any difference, whether it be palace or hovel; but when he leaves his 'castle' and goes abroad, this independence is at an end. He walks the streets; but he is subject to the prevailing law of Equality; nor can he appropriate the sidewalk to his own exclusive use, driving into the gutter

Court's 1883 ruling exempting from the reach of the 14th Amendment the private proprietor trading in the public domain.

Today the moving purposes of the Emancipation Amendments are yet to be fulfilled, while Negro Americans remain social outcasts in the economic and public life of their localities, relegated to the back of the bus in their ride to work and the back alley in their search for lunch hour refreshment. The default on a profound constitutional promise which these realities expose to view, compels a reappraisal of concepts which define equal protection so narrowly as to rob it of its vitality. Such a reappraisal points inexorably to the conclusion that state law cannot tolerate and accordingly cannot enforce racial segregation at places of public accommodation.

all whose skin is less white than his own. But nobody pretends that Equality on the highway, whether on pavement or sidewalk, is a question of society. And, permit me to say, that Equality in all institutions created or regulated by law, is as little a question of society." Cong. Globe, 42nd Cong., 2d Sess., 382.

Conclusion

For the reasons herein set forth, the judgment below should be reversed with instructions to dismiss the proceedings against petitioners.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 6

WILLIAM L. GRIFFIN, ET AL., PETITIONERS

v.

STATE OF MARYLAND

No. 9

CHARLES F. BARR, ET AL., PETITIONERS

v.

CITY OF COLUMBIA

No. 10

SIMON BOUIE, ET AL., PETITIONERS

v.

CITY OF COLUMBIA

No. 12

ROBERT MACK BELL, ET AL., PETITIONERS

v.

STATE OF MARYLAND

No. 60

JAMES RUSSELL ROBINSON, ET AL., APPELLANTS

v.

STATE OF FLORIDA

**ON WRITS OF CERTIORARI TO THE SUPREME COURT OF SOUTH
CAROLINA AND THE COURT OF APPEALS OF MARYLAND AND
ON APPEAL FROM THE SUPREME COURT OF FLORIDA**

**SUPPLEMENTAL BRIEF FOR THE UNITED STATES AS AMICUS
CURIAE**

This brief is filed pursuant to the Court's order of
November 18, 1963, inviting the Solicitor General,
pursuant to his suggestion, to file a brief expressing

the views of the United States upon "the broader constitutional issues which have been mooted" in these cases.

We confine the brief to those issues, but believe it appropriate to note two somewhat narrower grounds specially applicable to *Robinson v. Florida*, No. 60, which came to our attention in preparing to argue the broader issues.

1. At the time petitioners *Robinson et al.* were arrested, there was in effect a regulation of the Florida Board of Health applicable to restaurants (Florida State Sanitary Code, Chapter VII, Section 6), which provided:

Toilet and lavatory rooms must be provided for each sex and in case of public toilets or where colored persons are employed or accommodated separate rooms must be provided for their use. Each toilet room shall be plainly marked, viz: "White Women," "Colored Men," "White Men," "Colored Women."

¹ *A Manual of Practice for Florida's Food and Drink Services based on the Rules and Regulations of the Florida State Board of Health and State Hotel and Restaurant Commission*, published in July 1960 (one month before petitioners were arrested), prescribed (pp. 140-141):

"4.6.7—Toilet and hand washing facilities

"(a) Basic requirement—In every food and drink service establishment adequate toilet and hand washing facilities shall be available for employees and guests. Separate facilities shall be provided for each sex and for each race whether employed or served in the establishment. Toilet rooms shall not open directly into a room in which food or drink is prepared, stored or served."

The substance of the regulation quoted in the text was reissued on June 26, 1962, and is now part of Florida Administrative Code, Chapter 170C, Section 8.06. See pp. 99-100, *infra*.

While the regulation does not require segregation in the parts of the restaurant where customers are eating, the regulation not only gives official support to the principle of racial segregation but puts the proprietor who desires to serve both races indiscriminately to the financial burden of providing duplicate toilets and lavatories.² Thus, the regulation would seem to impose sufficient State pressure to bring the case within *Peterson v. Greenville*, 373 U.S. 244, and *Lombard v. Louisiana*, 373 U.S. 267.

2. The views expressed by Mr. Justice Stewart in *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 726, would also seem to require reversal in the *Robinson* case.

Chapter 509 of Florida Statutes Annotated sets forth a comprehensive code of regulation for public lodging and public food service establishments. Section 509.092, however, provides—

Public lodging and public food service establishments are declared to be private enterprises and the owner or manager of public lodging and public food service establishments shall have the right to refuse accommodations or service to any person who is objectionable or undesirable to said owner or manager.

² A restaurant serving fewer than 100 people at one time would be required to have one toilet and one lavatory for women, one toilet, one urinal and one lavatory for men, provided that no Negroes were accommodated. If Negroes were accommodated, the facilities would have to be duplicated. See *A Manual of Practice for Florida's Food and Drink Services*, *supra*, p. 141.

It is undisputed that petitioners were refused service only because they were either Negroes or in the company of Negroes (R. 19-20, 29).

Section 509.141, the statute under which petitioners were convicted, authorizes the manager to eject any person who, in his opinion, is a—

person whom it would be detrimental to such
* * * restaurant * * * for it any longer to
entertain.

The managers invoked this section because they believed that enforcing segregation accorded with the wishes of a majority of the people of the county and any contrary course would be detrimental to the business.

The statute in *Burton v. Wilmington Parking Authority* allowed a proprietor to refuse to serve—

persons whose reception or entertainment by
him would be offensive to the major part of his
customers * * *

In *Burton*, Mr. Justice Stewart said—

There is no suggestion in the record that the appellant as an individual was such a person. The highest court of Delaware has thus construed this legislative enactment as authorizing discriminatory classification based exclusively on color. Such a law seems to me clearly violative of the Fourteenth Amendment.

Here, as in *Burton*, there is no suggestion in the record that any appellant as an individual was a person deemed detrimental to the business because personally offensive to other customers. Whites were automatically served and Negroes and groups contain-

ing Negroes were automatically excluded. Here, as in *Burton*, therefore, the highest court of the State has construed its legislation as authorizing a discriminatory classification based exclusively upon color.³ Such a law is invalid equally with the Delaware legislation, and the convictions thereunder should be reversed.⁴

We turn now to the broader issue.

QUESTION PRESENTED

In four of these five cases petitioners peacefully entered premises thrown open by the proprietor to the general public for the service of food and refreshments; in the fifth, they entered an amusement park offering entertainment to the public at large. In each

³ See also the statement of the trial court at R. 36. The instant case would seem even clearer than *Burton*, for the statute was enacted in 1957 in a context of systematic segregation.

⁴ It has been suggested that Mr. Justice Stewart's opinion in *Burton v. Wilmington Parking Authority* should be read as saying that there was no suggestion in the record that appellant's race made him "offensive to the major part of [the restaurant's] customers." Examination of the record makes it plain that this cannot be the meaning. The case was decided on cross motions for summary judgment. The third affirmative defense asserted the restaurant's right as a private business to refuse refreshment "to persons whose reception or entertainment would be offensive to the major part of its customers and would injure its business," and that the defendant "is therefore not bound to serve the plaintiff in its restaurant." Transcript of Record, p. 8, No. 164, October Term, 1960. On motion for summary judgment, that allegation would be taken as true. The nub of the matter, therefore, was that plaintiff was refused service not as an offensive individual but upon the ground that a majority of the customers desired a racial classification. The situation in the instant case is the same.

case, although otherwise acceptable, petitioners were refused service and asked to leave on the ground that they were Negroes or were in the company of Negroes. This was done pursuant to the proprietor's policy of denying service to Negroes as a class, although he rendered service to all other members of the public, without discrimination, to the extent of his facilities. In three of the cases Negroes were invited into the premises to buy goods, and their patronage was sought for all purposes except the service of food to be eaten there in the presence of white patrons.

In each instance petitioners refused to leave the premises when requested. They were arrested by the local police, prosecuted and subsequently convicted of criminal trespass or an equivalent crime. The relevant State laws afforded Negroes and non-Negroes technical equality in the limited sense that they gave no member of the public an enforceable right to entertainment or service in the establishments involved.⁴⁴

The question presented is whether the convictions are invalid under the equal protection clause of the Fourteenth Amendment, when it appears (as we shall argue)—

(1) that the convictions gave legal effect to a community-wide practice under which non-Negroes are automatically served in establishments of public accommodation while Negroes are automatically segre-

⁴⁴ The briefs previously filed in these cases present full statements of the facts and proceedings below. We have epitomized the essential elements to the extent necessary to present the broad constitutional issue.

gated or excluded in order to stigmatize them as members of an inferior race, and

(2) that the practice is an integral part of the fabric of a caste system woven of threads of both State and private action.

ARGUMENT

INTRODUCTORY

For nearly a century, a nation dedicated to the faith that all men are created equal nonetheless tolerated Negro slavery and still more widely espoused, in laws and public institutions, as well as private life, the thesis that the Negro is a servile race destined to be set apart as an inferior caste neither sharing nor deserving equal rights and opportunities with other men. A great war resulted. At the end the Thirteenth, Fourteenth and Fifteenth Amendments not only abolished human bondage but purported to eradicate the imposed public disabilities based upon the false thesis that the Negro is an inferior caste. Before their government, the Amendments taught, in the eyes of the law, all men—men of all races—are created equal.

Slavery was in fact abolished. The twin promise of civil equality failed of immediate performance. State laws were enacted, customs were promoted by public and private action, institutions and ways of life were established, all upon the pervasive thesis that, although human bondage was forbidden, Negroes were still an inferior caste to be set apart, neither sharing nor entitled to equality with other men.

One of the pivotal points in the State-promoted system of public segregation and subjection became separation in all places of public transportation, entertainment or accommodation.⁵ There the brand of inferiority burns the deepest; there the wrong is the greatest; for there no element of private association, personal choice or business judgment enters the decision—only the willingness to join in the imposition of the public stigma of membership in an inferior caste. There the Negro asks most insistently whether we mean our declarations and constitutional recitals of human equality or are content to live by, although we do not profess, the theories of a master race.

That is the question petitioners raised when they entered and sought service in these places of public accommodation. They raised the question in various forms. They raised a moral, and therefore in a sense

⁵ Throughout this brief we frequently use the term "places of public accommodation" as a convenient shorthand description of the soda fountains or lunch counters, restaurants and amusement park involved in these cases. The phrase seems apt to describe all establishments which throw their premises open to the public at large (except for any racial restrictions), which invite the patronage of the general public without selection either in the invitation or rendition of service, and which furnish lodging, food or drink, entertainment, amusement or similar services. The meaning might extend far enough to include gasoline service stations which "feed" the automobiles, just as the adjacent restaurant feeds the traveler. The exact limits are unimportant for it is the characteristics of the soda fountains or lunch counters, restaurants and amusement park described later in this brief that are legally significant and the expression is merely a shorthand way of describing them. If other establishments were shown to have the same characteristics, the same legal consequences would follow.

a personal question, as they presented it to the proprietors of the establishments in which they were arrested. The question became legislative as the demonstrations pressed the Congress and the States to consider whether to require establishments holding themselves out to the public to serve all members of the public without regard to race. It became a question for government, also, when the managers of the establishments called upon State authority to support a right to evict petitioners and thus join in maintaining the system of stigmatizing Negroes an inferior caste. When the State intervened, a constitutional issue was raised—how far and in what circumstances does the Fourteenth Amendment permit a State to support the system of public segregation of Negroes for the purpose of stigmatizing them as an inferior caste.

Only the last question is here. It is manifestly different from both the moral question posed for the individual and the policy questions presented to Congress and State authorities, but it is nonetheless related to the ideal of civil equality. While the Fourteenth Amendment does not lay upon individuals and non-governmental institutions the standards of conduct applicable to the States and does not compel a State to exercise all its regulatory power to abolish all forms of private (*i.e.*, non-governmental) discrimination, the Amendment does reach State-sponsored inequality in every form. In the *Civil Rights Cases*,

109 U.S. 3, 11, the Court drew the fundamental distinction:

It is State action of a particular character that is prohibited. Individual invasion of individual rights is not the subject-matter of the amendment. * * *

The distinction is deeply imbedded not only in our fundamental law but in our national life. It is essential to a free, pluralistic society. It is a product of our moral philosophy, which values freedom because it calls upon man to exercise his noblest quality—the power of choice between good and evil. Freedom, in this sense, is freedom to be foolish as well as wise, to be wrong as well as right. While the State may sometimes limit the choice, especially in the regulation of business conduct, there is room for legislative judgment. Nothing in the Constitution prevents a State which has always scrupulously stayed its hand, from continuing to prefer the course of private self-determination, at least for those who have not opened their premises to the public and perhaps even for those whose businesses are affected with a public interest. It would be equally false to ideals secured by the Thirteenth, Fourteenth and Fifteenth Amendments, however, to permit a State to use the cloak of private choice to hide affirmative State support for a caste system heavily infused with governmental action.

We unqualifiedly accept the fundamental distinction laid down in the *Civil Rights Cases*. Moreover, in applying it, we take for granted the proposition that the mere fact of State intervention through the courts

or other public authority in order to provide sanctions for a private decision is not enough to implicate the State for the purposes of the Fourteenth Amendment. In a civilized community, where legal remedies and sovereign authority have been substituted for private force, private choice in the use of property or business or social relations often depends upon the support of sovereign sanctions. Where the only State involvement is color-blind support for every property-owner's exercise of the normal right to choose his business visitors or social guests, proof that the particular property-owner was motivated by racial or religious prejudice is not enough to convict the State of denying equal protection of the laws.

But that is not this case. We deal here not with individual action but with a community-wide, public custom of denying Negroes the opportunity of breaking bread with their fellow men in public places in order to subject them to a stigma of inferiority as an integral part of the fabric of a caste system woven of threads of both State and private action. The refusal to allow an individual to eat at a lunch counter generally open to all orderly members of the public, when viewed in isolation, can be fairly described in legal terms as a businessman's exercise of the right to select his customers, or as the property owner's exercise of the right to choose whom he will permit upon his premises. Depending upon his motive, the manager's act may be petty, vindictive, immoral, a harsh business judgment, or even justifiable; but in the absence of statute his right is absolute. But history and an appreciation of current institutions

(whose meaning is partly a product of history) show that racial segregation in places of public accommodation cannot be viewed as merely a series of isolated private decisions concerning the use of property or choice of customers, or even as a widespread private custom unrelated to governmental action. The incidents are not separable. The custom is infused with official action both in its origins and implementation. The legal concepts applicable to isolated incidents are not more adequate to capture the truth of racial segregation in places of public accommodation than chemical formulas for body content are sufficient to describe mankind. By way of illustration, Hitler's pogroms were not mere instances of assault, battery and malicious destruction of property.

To break the institution into its components even for the purposes of analysis loses some of the reality, but in our argument we emphasize, first, that the essence of the practice of racial segregation in places of public accommodation is not the management of property or the selection of customers but the stigmatization of the Negro as an untouchable member of an inferior caste. Its only function is to preserve, despite the Thirteenth, Fourteenth and Fifteenth Amendments, the essence of the earlier disabilities associated with slavery but extended more widely through the Nation. Segregation in places of public accommodation does not involve the management of property or selection of customers in any true sense. These are public places, made so by the proprietors' voluntarily inviting the public at large to use them. Between proprietor and customer there is only the

most casual and evanescent of all business relationships. Any orderly person is served, always and automatically, except those branded as members of an inferior race. There is none of the continuity or selectivity that enters into employment; and none of the personal contact or need for mutual trust, confidence and compatibility that characterizes the doctor-patient and lawyer-client relationships. The virtual irrelevance of the legal concepts of private property is vividly demonstrated by the practice of many department stores. They solicit the patronage of Negroes, invite them onto the property and into the store, make sales in other departments—some even furnish food to eat away from the counter—but then they deny the Negro the privilege of breaking bread with other men. Manifestly, it is the stigma—the brand of inferiority—that is important, not presence on the premises or the character of customers.

Second, we show that the practice of stigmatizing Negroes as an inferior caste by refusing to serve them in places of public accommodation together with their fellow men is a product of State action in the narrowest sense, although not currently required by law, because it is an important and inseparable part of a system of segregation established by a combination of State and private action. When the Thirteenth, Fourteenth and Fifteenth Amendments outlawed slavery and sought also to eradicate the public disabilities relegating Negroes to the status of an inferior caste, respondents and some sister States were unwilling to eliminate all vestiges of the caste system from their jurisprudence, official policies and public insti-

tutions and leave the development of business, professional and social relations to private choice. State statutes and municipal ordinances, on a wide scale, required segregation in places of public accommodation, upon common carriers, and in places of public entertainment. State laws provided for segregation in related areas such as schools, court houses and public institutions. State policies expressed, in countless other ways, the notion that Negroes should be treated as an inferior caste. The community-wide fabric of segregation thus was filled with the threads of law and government policy woven by government through the warp of custom laid down by private prejudice. The system is all of a piece. Segregation in places of public accommodation cannot be severed and appraised in isolation. One cannot tell what would happen if the threads of State law and State policy were pulled from the cloth, save that manifestly it would be changed.

After developing these two points in the hope of clarifying the true nature of the institution with which the cases are concerned, we return to the legal question—whether a State which has fostered the practice of racial segregation in places of public accommodation in order to preserve the stigma upon the Negro as an inferior caste, contrary to the promise of the Thirteenth, Fourteenth and Fifteenth Amendments, may now, consistently with the requirements of the Fourteenth Amendment, use the sovereign authority of its police and courts to sanction the eviction of Negroes, pursuant to the practice, as an exercise of private choice.

It is a settled principle that a State cannot exculpate itself merely by showing that the racial segregation or some other invasion of fundamental interests was contingent upon the decision of private individuals. *Shelley v. Kraemer*, 334 U.S. 1; *Pennsylvania v. Board of Trusts*, 353 U.S. 230; *Burton v. Wilmington Parking Authority*, 365 U.S. 715; *Lombard v. Louisiana*, 373 U.S. 267; *Railway Employees' Dept. v. Hanson*, 351 U.S. 225. This is not to retract our previous acknowledgement that neither recognition of a right of private choice in a business subject to public regulation nor the use of State power to safeguard the choice once made is automatically sufficient to implicate the State for the purposes of the Fourteenth Amendment. It is to assert, in a complex, civilized community where public and private action are interwoven and interdependent, that the determination of a State's responsibility under the Fourteenth Amendment depends upon a judgment upon the size and importance of the elements of State involvement in relation to the elements of private action, both measured from the standpoint of the fundamental aims of the constitutional guarantees.

The framers of the Thirteenth, Fourteenth and Fifteenth Amendments were not content merely to forbid human bondage. They were equally determined to remove the widespread public disabilities, associated with slavery, that branded the Negro an inferior caste excluded from the promise that in America all men are created equal. This is the heart of the guarantees of the privileges and immunities of citizens, of equal voting rights, and of equal protection of the laws.

The Fourteenth Amendment, it must be emphasized, required major changes in State laws; the old slave codes were to be repealed; civil disabilities in owning property, in contracting and in the laws of inheritance were to be eradicated; there were to be no State barriers to business opportunities and the professions; nor were the States left free passively to watch Negroes suffer individual wrongs at the hands of private persons in situations in which the State would intervene to protect non-Negroes.

On the other hand, the Amendments left most social and business associations to private choice. Where the law did not compel social intercourse, business associations and other private relationships among whites, the Amendment did not require them between whites and Negroes. Whether a Negro won equality and acceptance in the private world outside the sphere of government once freed from the public stigma of civil disabilities would depend upon his own capacities and efforts, hampered perhaps by personal prejudices but freed from the caste system.

In historical terms it can hardly be denied that any State intervention in support of the preservation of the caste system in an everyday element of public life defeats the promise of the Amendments. In stricter legal terminology, the elements of State "involvement" in these cases are sufficient; we submit, to carry State "responsibility" for the constitutional injustice.

The State is involved because its police intervened, its officials prosecuted the petitioners, and its courts convicted and sentenced them as a result of racial dis-

crimination. The discrimination became operative through the State's action. The State cannot close its eyes to what all other men see.

The State is further involved because the discrimination occurred in public places, voluntarily thrown open by the proprietors to the community at large. It occurred in a segment of public life in which the rights and duties—the relationships between the proprietor and the invited public—have always been a special concern of the legal system. In each of the respondent States, but especially in Florida, the relationship between these places of public accommodation and the general public is so closely supervised as to involve the State in all its aspects.

The States are involved through their support of the system of segregation. For both the Negro and the white supremacists, discrimination in places of public accommodation is a pivotal point in the caste system. The respondents and neighboring States commanded segregation for many years on a broad front. Between State policy and the prejudices and customs of the dominant portions of the community there was a symbiotic relation. The prejudices and customs gave rise to State action. Legislation and executive action confirmed and strengthened the prejudices, and also prevented individual variations from the solid front. State involvement under such conditions is too clear for argument, even though segregation might be the proprietor's choice in the absence of legislation. Cf. *Peterson v. Greenville*, 373 U.S. 244.

State responsibility does not end with the bare repeal of laws commanding segregation in places of public accommodation. The very history of the caste system belies the claim of legal innocence when the State, in these and similar cases, intervenes to support its central stigma. The State is responsible for the momentum its action has generated. The law is filled with instances of liability for the consequences of negligent or wrongful acts carried through a chain of cause and effect until the connection between the wrong and the consequences has become too attenuated to be a substantial factor in the harm. Until time and events have attenuated the connection, the respondents continue to bear responsibility for the conditions, which they shared in creating, that result in branding Negroes an inferior caste. They have not wiped the slate clean.

We recognize that treating the discrimination as a consequence of State action for the purposes of imposing a measure of State responsibility will, to a corresponding extent, lessen the opportunities and protection for private choice. Decision here requires striking a balance with liberty and equality in opposing scales. The "liberty" asserted is hardly consequential. These are all business premises thrown open to the public. The proprietors have voluntarily foregone virtually all power of choice concerning the customers they serve. There is no element of personal selection or personal judgment. Non-Negroes are served automatically; Negroes are automatically

segregated or excluded.⁶ With rare exceptions there is no other basis of choice.

There may be instances where the racial choice is purely private in the sense that the proprietor would make it even if the States had been truly neutral and no community system of segregation had been preserved. While our reasoning would sweep them under the one conclusion until the caste system is eliminated from public places, there is no unfairness in this conclusion. When the proprietor of a place of public accommodation discriminates against Negroes in a community which practices segregation, he knows that he is joining in the enforcement of a caste system and his acts take on the color of the community practice and suffer the common disability resulting from the community wrong. "[T]hey are bound together as the parts of a single plan. The plan may make the parts unlawful." *Swift & Co. v. United States*, 196 U.S. 375, 396; *Terry v. Adams*, 345 U.S. 461, 470, 476 (Mr. Justice Frankfurter concurring). The risk that some proprietors may lose State protection for an arbitrary choice not influenced by the State's previous conduct is not great enough to permit the continuance of support for the caste system, which is a product of State involvement. Cf. *Texas & N.O.R. Co. v. Brotherhood of Railway & S.S. Clerks*, 281 U.S. 548; *National Labor Relations Board v. Southern Bell Co.*, 319 U.S. 50.

These⁶ problems, moreover, lie in an area where there is little basis for the plea of private rights. The proprietors of places of public accommodation

open their property and business to public use. While the dedication cannot supply affirmative elements of State involvement, it is relevant in weighing the significance of those elements for the purposes of the Fourteenth Amendment: "The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it." *Marsh v. Alabama*, 326 U.S. 501, 506.

The choice of affirmative remedies for State involvement in a system of segregation in places of public accommodation rests with Congress under Section 5 of the Fourteenth Amendment. We do not argue that Negroes would have a direct action against such an establishment to secure the services of food or admission to entertainment. Our contention is simply that a State which has contributed to this evil custom may not constitutionally take steps to aid its enforcement in public places. The same reasoning that interdicts State action in the form of arrests and criminal prosecution equally condemns State support for the caste stigma in the recognition of a legal privilege to use private force against the person. Whoever first resorts to violence is guilty of a breach of the peace; be he the Negro seeking to enter and be served or the operator seeking to evict him. The State may punish such disturbances of public order without discrimination. The failure to accord either party that normal protection against an aggressor upon racial grounds would also be a denial of equal protection of law.

Beyond this point, the question is for Congress. Congress alone can meet the present national crisis arising from the system of segregation by removing the fundamental injustice in places of public accommodation. Neither petitioners nor the United States is arguing that the Court should undertake to hold that places of public accommodation must serve all members of the public alike without regard to race or color. The Court, being subject to judicial and constitutional limitations, cannot solve the whole problem. There is judicial power, nevertheless, to scrutinize a State's contribution to the injustice and to invalidate any convictions flowing from affirmative State involvement. After a century of frustration, it is not too much for petitioners to ask that, whatever action the Congress may take, the barriers raised by the Thirteenth, Fourteenth and Fifteenth Amendments to any continued State support for the caste system should be made unmistakably plain.

I

THE REFUSAL TO ALLOW NEGROES TO EAT WITH OTHER MEMBERS OF THE PUBLIC OR TO SHARE AMUSEMENT IN THESE PLACES OF PUBLIC ACCOMMODATION WAS AN INTEGRAL PART OF A WIDER SYSTEM OF SEGREGATION ESTABLISHED BY A COMBINATION OF GOVERNMENTAL AND PRIVATE ACTION TO SUBJECT NEGROES TO CASTE INFERIORITY

At the heart of these cases lies the necessity for understanding the human significance of the institutions with which we deal. The courts below reasoned

that the States had not violated the Fourteenth Amendment because under their law no one has a legal right to be served in a place of public accommodation and anyone, white or Negro, is subject to prosecution and conviction if he refuses to leave the private property at the proprietor's request. The decisions look only to technical legal equality of right and no-right in the immediate context. The courts below dealt in terms of the abstract legal concepts of property rights, trespass, freedom of association, and business choice without going behind the formulas to see what is actually involved.

In our view that approach is fundamentally wrong. We argue below the legal error of confining the focus so narrowly (Point II, pp. 64 ff.), but first we seek to catch the truth of these events. A department-store's refusal to serve a Negro at its lunch counter is not, in truth, either for the Negro, the proprietor or the community, an isolated act of personal antipathy. Nor is the exclusion from an amusement park. All are based upon an invidious classification applied by the proprietor automatically and invariably. Each proprietor acts pursuant to a community-wide practice. The practice serves the function of branding Negroes inferior to other men. It is an integral part of a caste system, based upon racial segregation, established by a combination of State and private ac-

tion. No other discrimination based upon race, nationality or religion is the same.*

Because the question for decision turns upon an appreciation of these simple, institutional facts,* we develop them in some detail before discussing their legal significance. Full presentation requires a study of the system of segregation as it followed in the wake of Negro slavery, but we concentrate first upon the facts pertaining to discrimination in places of public accommodation: lunch counters, restaurants and an amusement park are here involved.

A. ACTS OF RACIAL DISCRIMINATION IN PLACES OF PUBLIC ACCOMMODATION ARE PARTS OF A COMMUNITY-WIDE PRACTICE STIGMATIZING NEGROES AN INFERIOR CASTE

When these cases arose, the practice of excluding or segregating Negroes in lunch counters, lunch rooms, restaurants, bars, hotels, and places of public amusement was almost universal in the former slave States. The pervasiveness of the discrimination is

*The reasoning does not apply with the same force, if at all, in jurisdictions where there has been no governmental support for the caste system and where the discrimination is uneven. Racial discrimination, even in these instances, might be regarded as the fringes of a single fabric; or distinctions could be drawn based upon differences in fact. The question seems more academic than practical. No cases have arisen under such conditions, so far as we know, and none seems likely to arise. Thirty States outside the old slave-holding areas have enacted equal public accommodations laws. See p. 31, n. 22, *infra*.

too notorious to require documentation. It is perhaps most dramatically illustrated by consulting the list of the cities where protest demonstrations have occurred in the last four years.⁷ Though it obviously

⁷ While no complete list is available, protests directed specifically against segregation in privately-owned places of public accommodation have occurred in at least the following communities:

Alabama: Birmingham, Gadsden, Huntsville, Mobile, Montgomery, Selma, Tuskegee.

Arkansas: Helena, Little Rock, Pine Bluff.

Delaware: Dover, Newark, Smyrna, Wilmington.

Florida: Bradenton, Clearwater Beach, Daytona Beach, DeLand, Dunnelloff, Gainesville, Jacksonville, Lakeland, Melbourne, Merritt Island, Miami, Ocala, Panama City, Pensacola, St. Augustine, St. Petersburg, Sarasota, Tallahassee, Tampa, Winter Haven.

Georgia: Albany, Americus, Athens, Atlanta, Augusta, Brunswick, Columbus, Savannah, Valdosta, Warner Robins.

Kentucky: Henderson, Lexington, Louisville.

Louisiana: Baton Rouge, Clinton, Hammond, New Orleans, Plaquemine, Shreveport.

Maryland: Annapolis, Baltimore, Cambridge, Catonsville, Crisfield, Cockeysville, Gwynn Oak, Ocean City, Prince Georges County, Silver Spring.

Mississippi: Clarksdale, Greenville, Greenwood, Jackson.

Missouri: Berkeley, Kansas City, St. Louis.

North Carolina: Chapel Hill, Charlotte, Concord, Dunn, Durham, Elizabeth City, Enfield, Fayetteville, Gastonia, Goldsboro, Greensboro, Henderson, High Point, Kinston, Lexington, Monroe, Mount Airy, New Bern, New Salem, Oxford, Raleigh, Rocky Mount, Salisbury, Shelby, Southport, Statesville, Thomasville, Williamston, Wilmington, Wilson, Winston-Salem.

South Carolina: Anderson, Beaufort, Charleston, Columbia, Denmark, Florence, Newberry, Orangeburg, Rock Hill, Southport, Sumter.

Tennessee: Chattanooga, Clarksville, Humboldt, Jackson, Knoxville, Memphis, Moscow, Nashville, Oak Ridge, Somerville.

Texas: Amarillo, Austin, Galveston, Houston, Kerrville, Longview, Marshall, San Antonio.

gives only a partial sampling of the areas involved, the list includes several cities in each of the Southern and border States, and reflects a generalized practice of segregation even in the most public of all places of public accommodation, the dime store, drug store or department store lunch counter. While the demonstrations met with a measure of success, usually in a very narrow area,⁹ and other forces have had their influence, the overall picture is not greatly changed. Even a partial record of State prosecutions involving attempts to break down the color barrier in places of public accommodation is eloquent testi-

Virginia: Arlington, Charlottesville, Danville, Farmville, Hampton, Hopewell, Leesburg, Lynchburg, Newport News, Norfolk, Petersburg, Portsmouth, Prince Edward, Richmond, Suffolk.

West Virginia: Bluefield, Charleston, Huntington, Wheeling.

This incomplete list is compiled on the basis of a study of the demonstrations from February 1, 1960, through March of the same year by Professor Pollitt, *Dime Store Demonstrations: Events and Legal Problems of First Sixty Days*, 1960 Duke L.J. 315, a report by the Southern Regional Council for the same two-month period, *The Student Protest Movement: Winter 1960* (April 1, 1960, rev.), and a survey of news reports made in the Department of Justice covering only the six-month period from May 20, 1963, to November 21, 1963. During the latter period, our reports show at least 663 demonstrations of this kind in the Southern and Border States.

⁸ See pollitt, *op. cit.*, *supra*.

⁹ An analysis of informal reports through October 15, 1963, indicates that many communities have desegregated lunch counter, but not other eating places, or hotels or theatres. It is also clear that, while many of the larger cities of the Southern and Border States have abandoned segregation in at least some accommodations, there has been very little desegregation in the smaller cities and towns, where most of the Negro population lives.

mony of the survival of the discrimination.¹⁰ Indeed, the number of such cases in this Court alone is instructive.¹¹

¹⁰ The Southern Regional Council asserts that more than 20,083 persons engaged in demonstrations against Negro discrimination in the 11 Southern States were arrested during 1963. See *Civil Rights: Year-End Summary* (Southern Regional Council, Inc., Dec. 31, 1963, mimeograph), p. 1. Another report by the same organization indicates that during the first nine months of 1961 at least 1190 persons were arrested in Florida and South Carolina alone in connection with protests against racial discrimination in places of public accommodation. See *The Student Protest Movement: A Recapitulation* (Southern Regional Council, Inc., September, 1961), pp. 5, 10.

¹¹ 1960 Term: *Boynnton v. Virginia*, 364 U.S. 454; *Burton v. Wilmington Parking Authority*, 365 U.S. 715.

1961 Term: *Garner v. Louisiana*, *Briscoe v. Louisiana*, *Hoston v. Louisiana*, 368 U.S. 157; *Bailey v. Patterson*, 368 U.S. 346, 369 U.S. 31; *In re Shuttlesworth*, 369 U.S. 35; *Turner v. City of Memphis*, 369 U.S. 350; *Taylor v. Louisiana*, 370 U.S. 154.

1962 Term: *Peterson v. Greenville*, 373 U.S. 244; *Shuttlesworth v. City of Birmingham*, 373 U.S. 262; *Lombard v. Louisiana*, 373 U.S. 267; *Gober v. Birmingham*, 373 U.S. 374; *Avent v. North Carolina*, 373 U.S. 375 (remanded); *Randolph v. Virginia*, 374 U.S. 97 (remanded); *Henry v. Virginia*, 374 U.S. 98 (remanded); *Thompson v. Virginia*, 374 U.S. 99 (remanded); *Wood v. Virginia*, 374 U.S. 100 (remanded); Cf. *Edwards v. South Carolina*, 372 U.S. 229; *Wright v. Georgia*, 373 U.S. 284.

1963 Term: *Drews v. Maryland*, No. 3; *Williams v. North Carolina*, No. 4; *Fox v. North Carolina*, No. 5; *Griffin v. Maryland*, No. 6, certiorari granted, 370 U.S. 935, reargument ordered, 373 U.S. 920; *Mitchell v. Charleston*, No. 8; *Barr v. Columbia*, No. 9, certiorari granted, 374 U.S. 804; *Bowie v. Columbia*, No. 10, certiorari granted, 374 U.S. 805; *Bell v. Maryland*, No. 12, certiorari granted, 374 U.S. 805; *Robinson v. Florida*, No. 60, probable jurisdiction noted, 374 U.S. 803; *Hamm v. Rock Hill*, No. 105; *NAACP v. Webb's City*, No. 362; *Lupper v. Arkansas*, No. 432. Cf. *Ford v. Tennessee*, No. 15 (leased municipal auditorium).

Nor does the discrimination result from a temporary and accidental concurrence of independent decisions by the operators of the establishments involved. Though not immemorial,¹² the prevailing practices have persisted for 60 or 70 years without interruption, often as part of the statutory law, almost invariably, it would appear, with official encouragement.¹³ It is today a public custom, in many respects a legal institution. The consequence is a rigid system which imposes itself with very little regard for the personal choice of the business operator.

Typically, the storeowner or restaurateur is not shaping his own policy, but deferring to broader pressures. He may be governed by the will of the community, including his customers, or he may be acting in part through loyalty to his fellows who expect him to "hold the line." Usually, he also is influenced by official pleas or attitudes.¹⁴ As the records in these very cases make plain, the proprietor who segregates is almost never deciding for himself: he is merely adhering to a preexisting custom,¹⁵ which often, until very recently, was embodied in the official legal code. Nor is there an entirely free choice whether to conform or not. In many instances, no doubt, acquiescence is willing, even enthusiastic. But those who are otherwise inclined are carried with the

¹² As we show later, pp. 50-53, *infra*, segregation in its present pervasive and rigid form is a relatively recent phenomenon. See, generally, Woodward, *The Strange Career of Jim Crow* (1955).

¹³ See Section B, *infra*.

¹⁴ See, e.g., *Lombard v. Louisiana*, 373 U.S. 267.

¹⁵ See the government's initial brief in these cases, pp. 11, 13, 16, 22.

tide. Experience shows that no change in the established pattern can be expected without the concerted action of most of the businessmen in the locality in any given group.¹⁶

While the records are not conclusive, it seems plain that the discrimination was part of a community-wide practice in the present cases. The 1957 annual report of the Commission on Inter-racial Problems and Relations to the Governor and General Assembly, p. 13, reveals that 91 percent of all public facilities in Baltimore then excluded or segregated Negroes. Even in 1962, change had been "slow and inconsistent." *Id.*, 1962, p. 23. In *Robinson v. Florida*, No. 60, the Shell's City restaurant was following "the customs and traditions and practice in this county—not only in this county but in this part of the state and elsewhere, not to serve whites and colored people seated in the same restaurant" (R. 30). The record in the *Barr* and *Bowie* cases is less explicit, but there appears to be little doubt that segregation was the rule in Columbia, South Carolina, at the time of the incidents in question.

Furnishing food and entertainment in a place of public accommodation does not involve any selection of customers or business associates in the usual sense of the word, even when Negroes are excluded, nor

¹⁶ See, e.g., the testimony of Mayor Morris of Salisbury, Md., Hearings before the Senate Committee on Commerce on S. 1732, 88th Cong., 1st Sess., pp. 324-326.

does the practice of discrimination turn upon any judgment concerning the character or even the color of the persons whom the owner is willing to permit upon his premises. The unique quality of the choice to establish arbitrary racial segregation at lunch counters and in restaurants and amusement parks results partly from the public character of the premises and partly from the evanescent nature of the relationship between the proprietor and his customers.

We notice first the public character of the establishment. Whether it is a lunch counter, a restaurant, a hotel or place of amusement or entertainment, it is open to the public at large. The fact is reflected in several aspects of the law. The establishment is usually licensed and is often minutely regulated by the State or a municipal subdivision.¹⁷ That was true even before the modern proliferation of State regulation. What is more, the law has traditionally concerned itself with regulating admission to such establishments. Beginning with the early common law rule requiring innkeepers, "victuallers" and public

¹⁷ See Brief for Petitioners in Nos. 9, 10 and 12, p. 53, n. 28; Brief for the Appellant in No. 60, pp. 19-21, nn. 6-17.

carriers¹⁸ to serve all, the right to service in places of public accommodation has been viewed as a question of public interest, the resolution of which should not depend on the wishes of the business owner. The early State public accommodation laws of the Nineteenth Century, both North¹⁹ and South,²⁰ the federal Civil Rights Act of 1875,²¹ and, indeed, the compulsory segregation laws affecting this area, all disclose the same attitude, which is today reflected in public ac-

"* * * if an innkeeper, or other victualler, hangs out a sign and offers his house for travellers, it is an implied engagement to entertain all persons who travel that way; and upon this universal *assumpsit* an action on the case will lie against him for damages, if he without good reason refuses to admit a traveller." 3 Blackstone, *Commentaries* (Lewis ed., 1897), p. 166.

"A Victualling house is a house where persons are provided with victuals, but without lodging." 3 Stroud, *Judicial Dictionary* (1903), p. 2187.

See also Burdick, *The Origin of the Peculiar Duties of Public Service Companies*, 11 Col. L. Rev. 514 (1911); Wyman, *The Law of the Public Callings as a Solution of the Trust Problem*, 17 Harv. L. Rev. 156 (1903). Cf. Conard, *The Privilege of Forcibly Ejecting an Amusement Patron*, 90 U. of Pa. L. Rev. 809 (1942).

¹⁸ Between 1865 and 1897, Massachusetts, Kansas, New York, Connecticut, Iowa, New Jersey, Ohio, Colorado, Illinois, Indiana, Michigan, Minnesota, Nebraska, Rhode Island, Pennsylvania, Washington, Wisconsin and California enacted more or less comprehensive laws barring discrimination in places of public accommodation. For a detailed study of those statutes, see Stephenson, *Race Distinctions in American Law* (1910), pp. 111-153. Such a law was also passed in the District of Columbia. See *District of Columbia v. Thompson*, 346 U.S. 100; see, also, *Railroad Company v. Brown*, 17 Wall, 445.

²⁰ As we show later, during the period of Reconstruction, Louisiana, South Carolina, Georgia, Arkansas, Mississippi and Florida adopted more or less broad public accommodation laws. See notes 83-85, *infra*.

²¹ 18 Stat. 335.

commodation laws in 30 of the 50 States²² and the District of Columbia.²³

The public character of such places is also reflected in other aspects of the legal system. They are treated as public under criminal laws prohibiting gaming, vulgar language and similar misconduct in "public places."²⁴ Tort liability for negligence is imposed as

²² Alaska: Stat. § 11.60.230 (1962); California: Civ. Code § 51; Colorado: Rev. Stat. § 25-1-1 (1953); Connecticut: Gen. Stat. § 53-35 (1962 Supp.); Idaho: Code § 18-7301 (1963 Supp.); Illinois: Stat. § 38-13.1 (1961); Indiana: Stat. § 10-901 (1963 Supp.); Iowa: Code § 725-1 (1962); Kansas: § 21-2424 (1961 Supp.); Maine: Rev. Stat. § 137-50 (1963 Supp.); Maryland: Code § 49B-11 (1963 Supp.); Massachusetts: Laws § 272-92A (1956); Michigan: Stat. § 28.343 (1962); Minnesota: Stat. § 327.09 (1947); Montana: Rev. Code § 64-211 (1962); Nebraska: Rev. Stat. § 20-101 (1954); New Hampshire: Rev. Stat. § 354.1 (1963 Supp.); New Jersey: Stat. § 10:1-2 (1960); New Mexico: Stat. § 49-8-3 (1963 Supp.); New York: Civ. R. § 40; North Dakota: Code § 12-22-30 (1963 Supp.); Ohio: Rev. Code § 2901.35 (1954); Oregon: Rev. Stat. § 30.670 (1961); Pennsylvania: Stat. § 18-4654 (1963); Rhode Island: Gen. Laws § 11-24-1 (1957); South Dakota: ch. 58, Laws 1963; Vermont: Stat. § 1451 (1958); Washington: Rev. Code § 49.60.215 (1962); Wisconsin: Stat. § 942.04 (1958); Wyoming: Stat. § 6-83.1 (1963 Supp.).

²³ D.C. Code § 47-2907 (1961).

²⁴ See, e.g., *Drews v. Maryland*, 167 A. 2d 341 (Md. 1961), pending on petition for certiorari, No. 3, this Term (conviction for refusal to leave amusement park under statute prohibiting disorderly conduct in a "place of public resort or amusement"); *Nelson v. Natchez*, 19 So. 2d 747 (Miss. 1944) (conviction for profanity in restaurant under ordinance prohibiting profanity in a "public place"); *Hamilton v. State*, 104 So. 345 (Ala. 1925) (conviction for profanity at carnival under statute prohibiting profanity in a "public place"); *Yarbrough v. State*, 101 So. 321 (Ala. 1924) (same). See, also, *Garner v. Louisiana*, 368 U.S. 157 ("disturbing the peace" at lunch counters); *Thompson v. Louisville*, 362 U.S. 199 ("loitering" and "disorderly conduct" in café).

if the premises were a street or public square. For example, the owner of Shell's City or the Taylor Drugstore would be liable to one passing through the premises as a shortcut even though he had no intention to make a purchase. *Restatement Torts*, Section 330(d); *Renfro Drug Co. v. Lewis*, 149 Tex. 507, 235 S.W. 2d 609; cf. *Carlisle v. J. Weingarten, Inc.*, 137 Tex. 220, 152 S.W. 2d. 1073 ("The most essential factor to be considered in determining this issue is whether the premises were public or private.").

If the law has long regulated admission to places of public accommodation, it is because they are truly public service establishments. They perform an important function in serving the commonplace needs of the whole community. Appropriately, they hold themselves out as open to the general public; and they are open in fact, except for the color line. Neither in theory, nor in practice, is there any basis for the claim made here that such businessmen "select" their customers. Their admission policy is wholly indiscriminate. As Professor Thomas P. Lewis has said:

There is probably no expectation, with or without a legal basis, which is more firmly established than the expectation of the average person that he will be served in places of public accommodation. The expectation is cemented in the private enterprise system which created the accommodations. They exist to serve; it would be absurd in the extreme to imagine that a place built and designed to serve the people would be used in a way inconsistent with the purpose for which it was built and inconsistent

with the use which will allow it to survive and prosper.²⁵

The establishments in question are also public in another respect. Not only do they perform a service of public importance and invite the community at large to enjoy it, but they are public places in something of the same sense as are the public streets, the public squares, the public parks. This is particularly true of an amusement park like Glen Echo (No. 6) and of public conveyances (not here involved), but to some extent it also characterizes drugstore lunch counters (Nos. 9 and 10), a department store restaurant (No. 60), and a sizable urban restaurant (No. 12), which are mere temporary resting places on a journey "downtown." In each instance, a relatively large group congregates and the service is offered and received "in public." It is a place where the relationship between the manager and his customers, and between one customer and another (unless they choose a closer association) is distant. There is no privacy, no intimacy. It is the relationship of strangers engaged in a public transaction.

The public locale has another relevance. It transforms the discrimination against the Negro who is excluded or ejected into a public affront, performed before an audience and usually with reference to that

²⁵ The quoted excerpt is from a paper entitled *The Role of Law in Regulating Discrimination in Places of Public Accommodation* (p. 14), which was delivered at a conference on "Discrimination and the law," sponsored by the University of Chicago and the Anti-Defamation League of B'nai B'rith, November 22-23, 1963. Publication is pending.

audience. The humiliation is the greater. The openness of the locale also discourages any violation of the prevailing code, for no breach of the color line can pass unnoticed.

It is absurd here to speak of an intrusion on privacy. Nor is there any real question of "association." The relationship is too casual, too ephemeral, too public, for any such claim. The proprietor makes no choice, except for the color line. This is not a home or club where private, personal, social intercourse is involved. It is unlike almost any other business relationship. Most economic relationships involve a significant personal factor—for example, those between an author and his publisher, a lawyer and his client, the owner of a home and his lodger, employers of many descriptions and their employees. In many instances, also, the relationship is one of considerable duration; again, the employment relationship is a case in point. Here there is no element of trust and confidence; no continuity, no personal association. The activity involved is as "everyday" and automatic as walking down the street, boarding a bus or posting a letter. When the ordinary citizen enters a drugstore and asks for a cup of coffee at the lunch counter, he assumes that his ancestry, his attributes and his personal qualities are wholly irrelevant and that the only requirement is the possession of ten cents. The same is true when he takes his child for a ride on the carousel in the local amusement park. One who goes to the back door of a restaurant to ask for a job as cook or waiter or to obtain a contract for supplying meat to the proprietor assumes, as a matter of common experience,

that the owner may make his decision to accept or reject the offer partly on the basis of personal considerations, perhaps wholly irrational or unworthy ones, but the reverse is true when one enters the front door as just another customer, cash in hand. If this seems so commonplace as hardly to require statement, it is because the absence of personal selection in places of public accommodation is an integral and unquestioned aspect of modern society.

Three of the cases now before the Court (Nos. 9, 10 and 16) demonstrate the truth of these observations. At Shell's City, at the Eckerd's Pharmacy and at the Taylor Drug Store, the Negro applicant for lunch-counter service is freely admitted in the other departments of the same store, or (as in No. 9) permitted to enter the lunchroom and order food but only for consumption off the premises. Elsewhere, the anomalies are even more pointed, as when Negro patrons are allowed to eat standing, but not seated, or at the stool counter, but not in a booth.²⁰ And the same distinctions apply in other accommodations. We need only cite the familiar exception of the train or street car Jim Crow laws which permit a Negro woman to ride in the forward section of the car if accompanying

²⁰ See Pollitt, *Dime Store Demonstrations: Events and Legal Problems of First Sixty Days*, 1960 Duke L. J. 315, 317; C. Johnson, *Patterns of Segregation* (1943). See, also, *The Student Protest Movement, Winter 1960*, Southern Regional Council Special Report (mimeograph).

²¹ A drugstore in Danville, Virginia, while serving Negroes Pepsi-Cola in paper cups (for which there was a one-cent additional charge), refused them Coca Cola and would not furnish a glass. *Cook v. Patterson Drug Co.*, 185 Va. 516, 39 S.E. 2d 304 (1946).

a white child.²⁷ "The Negro is acceptable as licensee upon the premises and as a customer. All that is objectionable is the assertion of human equality involved in breaking bread with other men.

The only possible conclusion is that segregation in places of public accommodation is a symbolic act, the sole purpose and effect of which is to stigmatize the Negro as an inferior race, not entitled to full equality even in the public life of the community. The notion of the racial inferiority of the Negro dates from the earliest days of slavery. It was conceived to justify the continued bondage of the African who had been enslaved as a "heathen" but was now a Christian.²⁸ And, whether supported by Biblical citations²⁹ or biological theories,³⁰ it prevailed as an official philosophy through the mid-Nineteenth Century. Chief Justice Taney stated that, when the Constitution was adopted, Negroes "had for more than a century before been regarded as being of an inferior order, and altogether unfit to associate with the white race, either in social or political relations, and so far inferior, that they had no rights which the white man was bound to respect." *Scott v. Sandford*, 19 How. 393, 407.

²⁷ See, e.g., S.C. Code (1962): § 58-1333.

²⁸ See Frazier, *The Negro in the United States* (1957), pp. 24-25; Woodson, *The Negro in Our History* (6 ed., 1932), pp. 82-87.

²⁹ See, e.g., *Pirate v. Dalby*, 1 Dallas 167, 168. The Biblical references are examined in Weyl, *The Negro in American Civilization* (1960), pp. 14-15.

³⁰ For some of these doctrines, see Weyl, *op. cit.*, pp. 114-115.

The supposed inferiority of the race at once explained its enslavement and was demonstrated by the slave status of most Negroes.³¹ But the principle of course applied also to free Negroes and they were accordingly viewed and treated as inferiors.³² The attitude is illustrated by an opinion of Chief Justice Lumpkin of the Georgia Supreme Court in 1853:

[W]e maintain, that the *status* of the African in Georgia, whether bond or free, is such that he has no civil, social, or political rights or capacity, whatever, except such as are bestowed upon him by Statute: * * * that the social and civil degradation, resulting from the taint of blood, adheres to the descendants of Ham in this country, like the poisoned tunic of Nessus; that nothing but an Act of the Assembly can purify, by the salt of its grace, the bitter fountain—the “*darkling sea*.”³³

³¹ As George Bernard Shaw observed, the same rationale prevailed long after slavery was abolished. In 1903, he said that “the haughty American Nation * * * makes the negro clean its boots and then proves the moral and physical inferiority of the negro by the fact that he is a shoeblack.” Shaw, *Man and Superman* (1916 ed.), p. xviii.

³² The degraded state of the free Negro before the Civil War is treated at some length in Weyl, *op. cit.*, pp. 52-62; Frazier, *op. cit.*, pp. 59-81; Dumond, *Antislavery* (1961), pp. 119-132; Wright, *The Free Negro in Maryland* (1921).

³³ *Bryan v. Walton*, 14 Ga. 185, 198. It is needless to add that the Georgia Assembly granted few rights to the Negro, free or slave. See the relevant statutes collected in H Hurd, *The Law of Freedom and Bondage in the United States* (1862), pp. 101-109.

It is basically the same doctrine that survives today in the institution of segregation.³⁴ We have only to listen to its modern exponents.³⁵ The argumentation of the late Senator Bilbo will sufficiently show the line of descent:

The principle of segregation of the white and Negro races in the South is so well known that it requires no definition. Briefly and plainly stated, the object of this policy is to prevent the two races from meeting on terms of social equality. By established practice, each race maintains its own institutions and promotes its own social life. The residential areas of the towns are segregated; separate schools are maintained;

³⁴ See, e.g., Konvitz & Leskes, *A Century of Civil Rights* (1961), pp. 3-37, 255-272; Frazier, *op. cit.*, pp. 671-674; Tumin, *Desegregation* (1958), pp. 190-191; Myrdal, *An American Dilemma* (Rev. ed., 1962), pp. 577-589, 592-599; Cash, *The Mind of the South* (1941), pp. 123-139; Woolter, *Southern Race Progress—The Wavering Color Line* (1957), pp. 135-145; Dollard, *Caste and Class in a Southern Town* (1957 ed.), pp. 62, 351-353; Handlin, *Race and Nationality in American Life* (1957), pp. 44-47; Allport, *The Nature of Prejudice* (1954), pp. 304, 438; Saenger, *The Social Psychology of Prejudice* (1953), pp. 256-257.

³⁵ See, e.g., Cleghorn, "The Segs," *Esquire* (January 1964), pp. 71, 133-136 (interviews with leading exponents of segregation); George, *The Biology of the Race Problem* (1962) (Report Prepared by Commission of the Governor of Alabama); Putnam, "This is the Problem!", *The Citizen* (Citizens' Councils of America, Nov. 1961), pp. 12-33; Collins, *Whither Solid South* (1947), pp. 75-81; Bilbo, *Take Your Choice, Separation or Mongrelization* (1947), pp. 54-55, 82-93; Shufeldt, *The Negro, A Menace to American Civilization* (1907), pp. 105-123; Page, *The Negro: The Southerner's Problem* (1904), pp. 54-55, 292-293; Lewinson, *Race, Class, and Party* (1932), pp. 82, 84 (statements by post-Reconstruction Southern legislators). See also statements quoted in Lomax, *The Negro Revolt* (1962), p. 27.

separate accommodations are provided for the members of each race in public places and on the trains, busses and street cars.

* * * demands [for equality] must necessarily be based on the acceptance of the doctrine of the equality of the two races and the denial of the inferiority of the Negro. If racial differences do not exist, then these writers are asking for equality for equal races, but if differences do exist, then they are asking for equality for unequals and the very basis of their argument is refuted. * * *

History and science refute the doctrine of the equality of the white and Negro races which is proclaimed by the proponents of racial equality in the United States today. There are inequalities and differences between the white and black races, and all the history of civilization affirms that the superior position belongs to the Caucasian. * * *

If any Negro reads this chapter and has just reason to think that he does not possess the inferior qualities of mind, body, and spirit which the greatest and most reliable scientists—students of the comparative qualities of the races—have pointed out, then let him thank God for that portion of white blood which flows through his veins because of the sin of miscegenation on the part of one or more of his ancestors."

"Bilbo, *op. cit.* at 49, 82, 93.

The notion of racial inferiority doubtless pervades all contemporary discrimination against the Negro. Yet, it is often disguised in other fears and prejudices, and sometimes plays only a small part in the hostility of the white.³⁷ Here, however, in the area of public accommodations, the dogma of Negro inferiority is obviously the only operative force. Denying the Negro the right to sit to eat in a public place, because white persons are eating, is plainly to tell him he is "not good enough."³⁸ It is a pure symbolism, directly borrowed from the etiquette of slavery.³⁹ There can be no doubt that the unvarying repetition of such a gratuitous insult in denying a common privilege marks the public degradation of the race.

B. THE STATES HAVE SHARED IN ESTABLISHING THE SYSTEM OF RACIAL SEGREGATION OF WHICH DISCRIMINATION IN PLACES OF PUBLIC ACCOMMODATION IS AN INSEPARABLE PART

In the communities from which these cases arise and in thousands of other cities and towns forced segregation in places of public accommodation is practiced without the legal compulsion upon the proprietors found in such instances as *Peterson v. Greenville*, 373 U.S. 244. To portray it as a purely private custom, however, is quite erroneous: As the *Peterson* case shows, the practice has often been required by law in the very kind of establishments with which

³⁷ See, e.g., Myrdal, *op. cit.*, pp. 582-586; Cash, *op. cit.*, pp. 123-139.

³⁸ L. Smith, *Killers of the Dream* (1949), pp. 19, 29.

³⁹ Doyle *The Etiquette of Race Relations in the South* (1937), pp. 18-20, 22, 60.

these cases are concerned. Far more important, the practice of segregation at places like lunch counters, restaurants and amusement parks is an inseparable aspect of the entire system of public racial segregation, and that system is the product of a combination of private action and State action violative of the Fourteenth Amendment.

We are not concerned with the distant past. State action prior to the Fourteenth Amendment is irrelevant. The interrelationships between segregation where food and amusement are furnished and other parts of the system cannot be understood, however, nor can the full significance of the States' activities be described, without a sketch of the historical background.

Slavery and the Free Negro before the Civil War

Of slavery itself little need be said. It is enough to remember that slaves were treated in law as the property of their masters and were accordingly wholly deprived of any social, civil or political rights. To say they were viewed as "inferiors" is to understate. As the spirit of abolition increased, and perhaps as a sense of guilt grew stronger, the defense of the institution not unnaturally grew more severe. If the Supreme Court of Florida represented the official attitude, it is difficult to exaggerate the temper of the times:

There is no evil against which the policy of our laws is more pointedly directed than that

of allowing slaves to have any other status than that of pure slavery. * * *

More revealing for our purpose, however, is the legal status of the free Negro in the United States before the War, for here the disabilities inflicted could only be justified on the ground of the inferiority of the whole race. Whatever their motives,⁴⁰ the fact is that most of the States (including many that had abolished slavery) seriously disadvantaged the "free person of color" and thereby branded him an inferior being. He was generally disenfranchised, was barred from coming into most States, and his movements, even within his own State, were seriously curtailed.⁴² But it was in the slave States that the law treated him most harshly.

Thus, in Maryland, every Negro was presumed a slave unless he could prove otherwise.⁴³ Even when recognized as a freeman, he could neither vote "nor

⁴⁰ *Miller v. Gaskins*, 11 Fla. 73, 78 (1864).

⁴¹ The free Negro was a source of anxiety for a number of reasons: he might arouse the slaves to dissatisfaction and insurrection; might enter into competition with white labor; might plunder, rob, or murder whites; and finally might offend simply by being a misfit in an otherwise bifurcated society. See Dumond, *Antislavery* (1961), pp. 119-125; Weyl, *The Negro in American Civilization* (1960), pp. 52-58; Doyle, *The Etiquette of Race Relations in the South* (1937), pp. 85-93.

⁴² See II Hurd, *The Law of Freedom and Bondage in the United States* (1862), pp. 2-218; Dumond, *op. cit.*; Weyl, *op. cit.*; Doyle, *op. cit.*

⁴³ *Burke v. Joe*, 6 Gill. & Johns. 136 (1834); *Hall v. Mullin*, 5 Har. & Johns. 190, 192 (1821). For the similar rule obtaining elsewhere, see cases reported in Wheeler, *Law of Slavery* (1837), pp. 392-408.

⁴⁴ Md. Laws, 1801, ch. 90; 1809, ch. 83; 1816, ch. 33; Md. Constitution, 1851, Art. I, § 1. These provisions, and those cited in notes 45-49, *infra*, are set out in II Hurd, *op. cit.*, pp. 19-24.

testify in court, except as against another Negro." He could not engage in certain occupations," or freely contract with respect to his own labor;" and he was subject to greater pains and penalties for offenses," liable to being sold as a slave and deported from the State." We refer to the opinion of Roger Taney (later Chief Justice) while Attorney General of the United States:

The African race in the United States even when free, are everywhere a degraded class, and exercise no political influence. The privileges they are allowed to enjoy, are accorded to them as a matter of kindness and benevolence rather than of right. They are the only class of persons who can be held as mere property, as slaves. And where they are nominally admitted by law to the privileges of citizenship, they have no effectual power to defend them, and are permitted to be citizens by the sufferance of the white population and hold whatever rights they enjoy at their mercy. They were never regarded as a constituent portion of the sovereignty of any state. But as a separate and degraded people to whom the sovereignty of each state might accord or withhold such privileges as they deemed proper. They were not looked upon as citizens by the contracting parties who formed the Constitution. They were evidently not supposed to be

⁴⁵ Md. Laws 1801, ch. 109; 1846-1847, ch. 27.

⁴⁶ *Id.*, 1805, ch. 80; Code 1860, Art. 66, § 74.

⁴⁷ Md. Laws 1854, ch. 273; Code 1860, Art. 66, §§ 76-87.

⁴⁸ Md. Laws 1825-1826, ch. 93.

⁴⁹ *Id.*, 1826-1827, ch. 229, § 9; Code 1860, Art. 66, § 53.

included by the term *citizens*. And were not intended to be embraced in any of the provisions of that Constitution but those which point to them in terms not to be mistaken.

* * * Our constitutions were not formed by the assistance of that unfortunate race nor for their benefit. They were not regarded as constituent members of either of the sovereignties and were not therefore intended to be embraced by the terms, *citizens of each state*.⁵⁰

In Florida, his condition was no better. There the free Negro required a "guardian" without whom he could not contract.⁵¹ Encouraged to re-enslave himself,⁵² he was taxed for the privilege of remaining free.⁵³ Worst of all was the lot of the freedman in South Carolina: there, too, Negroes were taxed and required to have guardians.⁵⁴ The official hostility of South Carolina toward the free Negroes is best shown in the enactment of 1823 (7 Stat. 463) which provided for the imprisonment of colored seamen during the stay of any vessel in a local port, a law enforced in defiance of the judgment of Mr. Justice Johnson, sitting on circuit, and an opinion of the Attorney General, that it was unconstitutional.⁵⁵ We add only the report of a law passed on the eve of secession which required every free Negro in South Carolina

⁵⁰ Swisher, *Roger B. Taney* (1936), p. 154.

⁵¹ Fla. Laws 1847-1848, ch. 155; 1856, ch. 794, 795. For these provisions and those cited in notes 52 and 53, *infra*, see II Hurd, *op. cit.*, pp. 190-195.

⁵² *Id.*, 1858-1859, ch. 860.

⁵³ *Id.*, 1842, ch. 32.

⁵⁴ S.C. Stat., 461, §§ 2, 7 (1822). See II Hurd, *op. cit.*, p. 97.

⁵⁵ Weyl, *The Negro in American Civilization* (1960), pp. 60-61; 1 Op. Atty. Gen. 639 (1824).

literally to wear a badge, identifying him by name, occupation and number.⁵⁶

Emancipation and its aftermath

It is against this background that the Thirteenth Amendment was adopted. In light of the condition of the nominally free Negro in the South, it is fair to suppose that it was viewed as a charter of freedom for all Negroes, slave or not. Indeed, the Civil Rights Act of 1866,⁵⁷ passed as implementing legislation, does not distinguish between the new freedman and the old. It was the Negro as a race that was intended to be given civil equality, to be freed of the badge of inferiority which had been imposed on all persons of color. So also, when the slaveholding States enacted their Black Codes in 1865 and 1866, recognizing the abolition of slavery as such, but subordinating the Negro in a hundred other ways, they did not distinguish between the former slave and the free person of color. They dealt indiscriminately with every person "tainted" with Negro blood, to the extent of 1/8th or even 1/16th.⁵⁸ All were equally disadvantaged and set apart as an inferior people.

The tenor of these post-war codes is sufficiently known. Some openly and directly disabled the Negro

⁵⁶ II Hurd, *op. cit.*, p. 100 (these enactments are not to be found in the laws of 1860. Hurd states they were reported in the "public journals" of the time).

⁵⁷ 14 Stat. 27.

⁵⁸ The substance of most of these codes is given in McPherson, *Political History of the United States During the Period of Reconstruction* (1871), pp. 29-44, and in 1 Fleming, *Documentary History of Reconstruction* (1906), pp. 273-312 (1906).

from meaningful participation in the public life of the community. Thus, in Mississippi, the freedman was effectively kept a servant on the plantation by provisions which recognized his right to purchase and inherit personal property, but not real property," and forbade his renting or leasing real estate except in incorporated towns, where authorized by the local authorities;⁵⁹ which required him to be employed by a written contract,⁶¹ except by official license, revocable at will;⁶² permitted minor Negroes to be forcibly "apprenticed";⁶³ and provided for the arrest and return of both classes to their employer for breach of the contract.⁶⁴ The injustice here was flagrant: While the Negro was sparingly granted some new rights—the right to marry, but not with whites,⁶⁵ the right to testify, but only when Negroes were involved in the proceeding⁶⁶—they were, at the same time, held to "the same duties and liabilities existing among white persons—to support their indigent families, and all colored persons," and were accordingly taxed for that purpose.⁶⁷

The laws of Mississippi are perhaps extreme in their unwillingness to allow the Negro to find a new life, in freedom. But other codes reflect the same at-

⁵⁹ Mississippi Laws 1865, ch. 4, § 1.

⁶⁰ *Ibid.*

⁶¹ *Id.*, ch. 4, § 6.

⁶² *Id.*, ch. 4, § 5.

⁶³ *Id.*, ch. 5, § 1.

⁶⁴ *Id.*, ch. 4, §§ 7, 8; ch. 5, § 4.

⁶⁵ *Id.*, ch. 4, §§ 2, 3.

⁶⁶ *Id.*, ch. 4, § 4.

⁶⁷ *Id.*, ch. 6, § 6.

titute, differing only in degree. The legislation of South Carolina, for instance, was plainly calculated to preserve the old order, the parties now being denominated "master and servant."⁶⁸ The series of laws there begins with one entitled "An Act preliminary to the legislation induced by the Emancipation of Slaves," which officially creates a class, including all Negroes, mulattoes and mestizoes, and their descendants, who have not 7/8ths or more "Caucasian blood," labelled "persons of color," and declares that "although such persons are not entitled to social or political equality," they shall enjoy certain specified rights, including the benefit of legal proceedings, "subject to * * * modifications" to be made.⁶⁹ There follow statutes creating special crimes for "persons of color,"⁷⁰ imposing different penalties for crimes common to both races,⁷¹ and establishing separate judicial procedures,⁷² regulating in detail the relationship of "master and servant,"⁷³ and disabling the Negro from engaging in the sale, for his account, of any agricultural product,⁷⁴ from manufacturing or retailing spirits,⁷⁵ or, for that matter, from carrying on any trade or business, "besides that of husbandry, or that of a servant," except by special license from

⁶⁸ See S.C. Acts 1865, p. 295 (No. 4733, § XXXV).

⁶⁹ *Id.*, p. 271 (No. 4730).

⁷⁰ *Id.*, pp. 271, 276 (No. 4731, §§ I, XXII).

⁷¹ *Id.*, pp. 271, 272, 277 (No. 4731, §§ I, IV, XXIV, XXVII).

⁷² *Id.*, pp. 279-280, 281, 283, 286, 286-287 (No. 4732, §§ V, VII, XX, XXIX, XXXI, XXXII, XXXIII).

⁷³ *Id.*, pp. 292-299 (No. 4733, §§ XV-LXXI).

⁷⁴ *Id.*, p. 274 (4731, § X).

⁷⁵ *Id.*, p. 275 (4731, § XIV).

the district judge.¹⁶ Finally come the "pauper" and "vagrancy" laws¹⁷ which appear to have served much the same purpose as enactments of a more recent day against "disturbing the peace," "disorderly conduct," and "trespass."¹⁸

In Florida, the situation was much the same.¹⁹ We need only notice the law enacted in January 1866, making it a misdemeanor for any "person of color" to "intrude himself into any religious or other public assembly of white persons, or into any railroad car or other public vehicle set apart for the exclusive accommodation of white people."²⁰ The rest was left to the towns and cities where "the free white male inhabitants over the age of twenty-one years" were permitted to elect a local government "with full power and authority * * * to license and regulate retailers of liquor and taverns," to "license and regulate theatrical and other public amusements," and to "provide for the interior police and good government" of the community.²¹

It was to combat the spirit of these black codes that Congress enacted the Civil Rights Act of 1866 and proposed the Fourteenth Amendment. Reconstruction followed. While segregation in schools

¹⁶ *Id.*, p. 299 (No. 4733, § LXXII).

¹⁷ *Id.*, pp. 300-304 (No. 4733, §§ LXXXI-XCIX).

¹⁸ See, e.g., testimony taken by the Joint Committee on Reconstruction, House Report No. 30, 39th Cong., 1st Sess., Testimony, Part II, pp. 61, 126, 177; *Freedom to the Free* (United States Commission on Civil Rights, 1965), p. 33.

¹⁹ See Fla. Laws 1865-1866, pp. 23-39.

²⁰ *Id.*, p. 25, ch. 1,466, § 14.

²¹ *Id.*, pp. 41-43, ch. 1,479, §§ 1, 3.

sometimes remained,"⁸² several Southern States enacted more or less broad laws banning racial discrimination in places of public accommodation." South Carolina enacted such laws in 1869, and also covering common carriers and all businesses "for which a license is required by law" or "under a public rule" and expressly referring to theatres and "places of amusement or recreation."⁸³ The Florida statute of 1873⁸⁴ provided:

* * * no citizen of this State shall, by reason of race, color, or previous condition of servitude, be excepted or excluded from the full and equal enjoyment of any accommodation, advantage, facility, or privilege furnished by innkeepers, by common carriers, whether on land or water, by licensed owners, managers, or lessees of theatres or other places of public amusement; by trustees, commissioners, superintendents, teachers, and other officers of common schools and public institutions of learning, the same being supported by moneys derived from general taxation, or authorized by law, also of cemetery associations and benevolent associations, supported or authorized in the same way: *Provided*, That private schools,

⁸² See e.g., Ala. Laws 1868, p. 148; Ala. Laws 1873, p. 176; Ala. Const. 1875, Art. XIII, § 1, Ark. Laws 1873, p. 423; Ga. Laws 1872, p. 69; Ky. Laws 1873-1874, p. 63; Tenn. Laws 1868-1869, p. 14.

⁸³ Ark. Laws 1873, pp. 15-19; Ga. Laws 1870, pp. 398, 427-428; La. Const. 1868, Art. 13; La. Acts 1869, p. 37; La. Acts 1873, p. 156; Miss. Laws 1873, p. 66. For South Carolina and Florida statutes, see notes following.

⁸⁴ 14 S.C. Stat. 179, 386.

⁸⁵ Fla. Laws 1873, p. 25, ch. 1947.

cemeteries, and institutions of learning established exclusively for white or colored persons, and maintained respectively by voluntary contributions, shall remain according to the terms of the original establishment.

Jim Crow and segregation

As soon as Reconstruction ended in 1877, and often before, segregation in public schools was established or resumed. That is true of the three States at bar,²⁶ where the official policy continued uninterruptedly, at least until this Court's decision in *Brown v. Board of Education*, 347 U.S. 483.²⁷ The undeviating public example must have had its effect. And segregation in the schools doubtless educated a new generation in the theory of the Negro's inferiority which required his being kept apart. So, also, the reiterated legal ban on interracial marriages, or miscegenation,²⁸ must have impressed upon any who were otherwise disposed that the "accepted," "official" doctrine viewed the Negro as an untouchable. Yet, for a time, there was little segregation, in fact or in law, in

²⁶ Maryland: Laws 1870, ch. 392, pp. 555-556; Laws 1872, ch. 377, pp. 650-651; Laws 1898, ch. 273, pp. 814-817; South Carolina: Const. 1895, Art. XI, § 8; Acts 1896, No. 63, p. 171; Acts 1906, No. 86, pp. 133-137; Florida: Const. 1885, Art. XII, § 12; Laws 1895, ch. 4335, p. 96.

²⁷ See Fla. Stat. (1960), § 228.09; S.C. Code (1962), §§ 21-751, 21-809, 22-3; Md. Code (1957), Art. 65A, § 1; Art. 77, §§ 226, 279.

²⁸ Maryland: Laws 1884, ch. 264, p. 365; South Carolina: Acts 1879, p. 3; Const. 1895, Art. III, § 33, p. 20; Florida: Laws 1881, ch. 3283, pp. 86, 753; Const. 1885, Art. XVI, § 24; Laws 1903, ch. 5140, p. 76.

places of public accommodation." Neither Florida nor South Carolina, though now free of federal interference, immediately repealed its anti-discrimination statute," and Maryland (though never "reconstructed") acquiesced in the removal of such Jim Crow regulations as had existed."

"See Woodward, *The Strange Career of Jim Crow* (1955), pp. 15-26.

"The Florida law is preserved in the codification of 1881. Fla. Digest 1881, ch. 19, pp. 171-172, and was not repealed until 1892. See Fla. Laws 1891, ch. 4055, p. 92; Fla. Rev. Stat. 1892, p. VIII. The similar South Carolina statute was retained in the 1882 Code (§§ 1369, 2601-2609) and was repealed in 1887 and 1889. See S.C. Acts 1886-1887, No. 288, p. 549; *id.* 1888-1889, No. 219, p. 362. See, also, Tindall, *South Carolina Negroes, 1877-1900*, pp. 291-293.

"Prior to 1870, the street car company in Baltimore had followed the practice of relegating Negroes to the front platform of the cars where they were unable to sit and were exposed to the elements. In April, 1870, U.S. Circuit Court Judge Giles ruled this practice discriminatory, awarded damages to a Negro who had been ejected from a seat inside the street car and held that the railway company was required to furnish its Negro passengers with accommodation comparable to that furnished white passengers. *Thompson v. The Baltimore City Passenger Railway Co.*, reported in *Baltimore American*, April 30, 1870, p. 1, col. 6; p. 2, col. 1. Pursuant to this ruling the railway company designated certain cars for "colored persons" but editorial comments in the *Baltimore American* indicate that voluntary desegregation on these cars took place at the initiative of white patrons. *Baltimore American*, November 11, 1871, p. 2, col. 2; November 14, 1871, p. 2, col. 1. In 1871, a Negro challenged the establishment of separate cars and the jury, charged by Judge Bond that a person seeking transportation might not be ejected from a car "because of color only," awarded him \$40. *Fields v. Baltimore City Passenger Railway Co.*, reported in *Baltimore American*, November 14, 1871, p. 4, col. 3; *Baltimore Sun*, November 13, 1871, p. 4, col. 2.

But this more benevolent official attitude was not to endure. Jim Crow laws applicable to trains and street cars began to appear. Among the States here involved, Florida leads with an 1887 statute requiring separate first-class railroad cars for the two races.²²

This decision was widely approved as illustrated by the following editorial comment from the *Baltimore American*, November 14, 1871, p. 2, col. 1:

"THE COLORED CAR QUESTION

"We congratulate our community on the disappearance yesterday of the sign-boards on the cars of the City Passenger Railway—'*Colored Persons admitted to this Car.*'"

"We think that our most intelligent merchants, as well as all others who are looking to the commercial and industrial advancement of Baltimore, will heartily thank Judge Bond for his decision in the Passenger Railway case, at least so far as it has caused the prompt disappearance from the cars of the Company of those badges of a dead prejudice, which ought to have been removed long since. * * *

"When our city was crowded with strangers from all parts of the country attending the great convocations here, this relic of a dead prejudice was the subject of constant remark. It had disappeared from the cars everywhere except here in Baltimore, and although assured it rather represented the prejudice of a private corporation than the sentiment of the people, they expressed surprise that our Courts allowed them to thus trifle with law and justice. It was at this time that we appealed to the Company to cease flaunting in the face of strangers this badge of shame, and not to await the action of the Courts to compel an impartial enforcement of the law. We cannot keep pace with the progress of the age in liberal and humanitarian sentiment if such things are allowed, and it becomes the duty of all who are looking to a brighter future for our city to make haste to get rid of any remnant of feeling that would indicate that we are not a law-abiding and liberal-minded people."

²² Fla. Laws 1887, ch. 3743, p. 116.

A decade later, in 1898, South Carolina adopted a similar provision,⁹³ specifying, however, that "any first-class coach may be divided into apartments, separated by a substantial partition, in lieu of separate coaches."⁹⁴ It is typical of the general pattern toward pervasiveness and rigidity that two years later the divided coach was decreed insufficient separation, the new law requiring altogether separate cars, and that the Jim Crow rule was extended to the entire train, not solely the first-class coaches.⁹⁵ The Maryland legislation, beginning in 1904,⁹⁶ followed the same course.⁹⁷

Once begun, the march of segregation legislation continued. The Jim Crow rule was now applied to all common carriers, including steamboats⁹⁸ and street cars.⁹⁹ While once only the conveyances themselves had been segregated, the new laws decreed separate waiting rooms and ticket windows.¹⁰⁰ The injunction and the penalty, originally running against the carrier alone, were now made applicable to the reluctant passenger also: not only must the company furnish

⁹³ S.C. Acts 1898, No. 483, p. 777-778.

⁹⁴ *Id.*, § 2.

⁹⁵ S.C. Acts 1900, No. 262, pp. 457-459.

⁹⁶ Md. Laws 1904, ch. 109, p. 186.

⁹⁷ Md. Laws 1908, ch. 292, p. 86. See, also, Fla. Laws 1909, ch. 5893, § 1, p. 407, banning the divided care except by special permission from the railroad commission.

⁹⁸ See, e.g., Md. Laws 1904, ch. 110, p. 188; Md. Laws 1908, ch. 617, p. 85; S.C. Acts 1904, No. 249, p. 438.

⁹⁹ See, e.g., Fla. Laws 1907, ch. 5617, p. 99; Md. Laws 1908, ch. 248, p. 88; S.C. Acts 1905, No. 477, p. 954.

¹⁰⁰ See, e.g., Fla. Laws 1907, ch. 5619, p. 105.

separate accommodations, but the user must obey the sign under the threat of criminal sanctions.¹⁰¹

The State next turned to its own institutions. Public school segregation was continued, and separation was decreed for State prisons,¹⁰² reformatories,¹⁰³ asylums,¹⁰⁴ hospitals.¹⁰⁵ Later, they would enact segregation in public parks, playgrounds and beaches.¹⁰⁶ But the legislators did not concern themselves only with governmentally operated facilities. We have already noticed the continuing official bar on interracial marriages.¹⁰⁷ Very early, the State also expressly prohibited mixed private schools,¹⁰⁸ and Florida, at least, made it a crime for white teachers to teach Negro children or the reverse.¹⁰⁹ While the regulation of privately owned places of public accommodation, other than common carriers, was, quite naturally, largely left to the municipalities, statewide leg-

¹⁰¹ See Fla. Laws 1905, ch. 5420, p. 99; Fla. Laws 1907, ch. 5617, § 6, p. 100; Md. Laws 1904, ch. 109, § 4, p. 187; Md. Laws 1904, ch. 110, § 3, p. 188; S.C. Acts 1900, No. 262, § 5, pp. 457-458.

¹⁰² See, e.g., Fla. Laws 1905, ch. 5447, § 1, p. 132; Fla. Laws 1909, ch. 5967, p. 171; S.C. Acts 1906, No. 86, pp. 133, 136-137; S.C. Acts 1914, No. 410, p. 169.

¹⁰³ S.C. Acts 1898, No. 483, p. 777-778.

¹⁰⁴ Md. Laws 1870, ch. 392, p. 706; Md. Laws 1882, ch. 291, p. 445; Fla. Laws 1897, ch. 4167, pp. 107-108; Fla. Laws 1909, ch. 5967, pp. 171-172; S.C. Acts 1900, No. 246, pp. 443-444.

¹⁰⁵ Baltimore Ordinances 1888, § 34-43; Md. Laws 1910, ch. 250, pp. 234, 237-240; S.C. Acts 1918, No. 398, pp. 729, 731.

¹⁰⁶ Md. Code 1912, § 199A.

¹⁰⁷ S.C. Acts 1984, No. 893, p. 1536.

¹⁰⁸ See note 88, *supra*.

¹⁰⁹ Fla. Laws 1895, ch. 4335, p. 96.

¹¹⁰ Fla. Laws 1913, ch. 6490, p. 311.

isolation sometimes set the example here too. Thus, in 1906, South Carolina required segregation of station restaurants and "eating houses" serving passengers,¹¹⁰ and later enjoined circuses and travelling shows to provide separate entrances for each race.¹¹¹ There was, finally, a law keeping the races apart in poolrooms and billiard halls.¹¹²

Where the central State government did not act directly, segregation was promulgated by the municipal authorities. Illustrative are the segregation provisions of the City Code of Greenville, South Carolina, repealed on May 28, 1963, after this Court's decision in *Peterson v. Greenville*, 373 U.S. 244. An entire chapter of that Code is devoted to "Segregation of Races." Explicitly announcing an "intent and purpose * * * to provide for the separation or segregation of races in the city,"¹¹³ it proceeds, methodically, to define "white" and "colored" blocks,¹¹⁴ and decrees segregation in housing,¹¹⁵ churches,¹¹⁶ schools,¹¹⁷ hotels,¹¹⁸ stores,¹¹⁹ restaurants, cafes, and all other places serving food, including lunch counters,¹²⁰ and transportation.¹²¹ Elsewhere in the Code it is made generally unlawful "for any colored person to

¹¹⁰ S.C. Acts 1906, No. 52, p. 76.

¹¹¹ S.C. Acts 1917, p. 48 (S.C. Code (1962), § 5-19).

¹¹² S.C. Acts 1924, p. 895 (S.C. Code (1962), § 5-503).

¹¹³ Greenville City Code (1953), § 31-4.

¹¹⁴ *Id.*, § 31-1.

¹¹⁵ *Id.*, § 31-2, 9, 10.

¹¹⁶ *Id.*, § 31-5.

¹¹⁷ *Id.*, § 31-6.

¹¹⁸ *Id.*, § 31-7.

¹¹⁹ *Id.*, § 31-7.

¹²⁰ *Id.*, § 31-8. See, also, *id.*, § 16-35, requiring restaurants to provide separate toilets for white and colored employees.

¹²¹ *Id.*, § 31-12 *et seq.*; § 31-30.

enter upon or go through any of the city cemeteries or grounds connected therewith, used exclusively for the burial of white persons * * * ¹²²

While the number of similar municipal regulations is not known, it is clear that the example just recited is not atypical.¹²³ The City Code of Greenwood, S.C., amended only last June, was quite similar.¹²⁴ Some of the provisions elsewhere are truly bizarre.¹²⁵ One

¹²² *Id.*, § 8-1.

¹²³ See, e.g., Birmingham, Ala. Code (1944): restaurants (§ 369); theatres (§ 859); poolrooms (§ 939); restrooms (§ 1110); housing (§ 1604); Montgomery, Ala. Code (1952): restrooms (§ 13-25); restaurants (§ 10-14); theatres (§ 34-5); poolrooms (§ 25-5); parks and swimming pools (§ 28A-2); athletic contests (§ 28A-5); Selma, Ala. Code (1956 Supp.): recreational facilities (§ 627-1); restaurants (§ 627-6); Atlanta, Ga. Code (1942): public assemblies (§ 36-64); parks (§ 38-31); theatres (§ 56-15); Augusta, Ga. Code (1952): barbershops (§ 8-2-26); Monroe, La. Code (1958): cemeteries (§ 7-1); bars (§ 4-24); New Orleans, La. Code (1956): bars (§ 5-61.1); Shreveport, La. Code (1955): housing (§ 8.2); toilets (§§ 8.3, 11-47); loitering by whites in Negro districts a form of vagrancy (§ 24-56); restaurants (§ 24-36); Meridian, Miss. Code (1962): jails (§ 17-97); Natchez, Miss. Code (1954): cemeteries (§ 5.6); Jackson, Miss. Code (1938): cemeteries (§ 546); Asheville, N.C. Code (1945): housing (§ 3-23-636); cemeteries (§ 2-5-109); sexual relations (§ 2-7-120); Charlotte, N.C. Code (1961): restrooms (§ 13-13-11); poolrooms (§ 11-11-2(b)); Danville, Va. Code (1962): cemeteries (§ 18-13); Norfolk, Va. Code (1950): cemeteries (§ 9-30). Some of these ordinances have been repealed or amended during 1962 and 1963.

¹²⁴ Greenwood City Code (1952), ch. 24.

¹²⁵ See, e.g., Montgomery, Ala., Code (1952) ch. 26-28 and Gadsden, Ala., Code § 8-18 (1946), which provide in pertinent part:

"It shall be unlawful for a negro and a white person to play together * * * in the city in any game of cards, dice, dominoes or checkers * * *"

Charlotte, N.C., Code (1961) § 13-13-15(a) provides in pertinent

obviously degrading provision common to most Southern municipalities, and perhaps to all, is the requirement of the "Southern Standard Building Code" that "where negroes and whites are accommodated there shall be separate toilet facilities provided for the former, marked 'For Negroes Only'."¹²⁶ By virtue of a regulation of the State Administrative Code,¹²⁷ that is the law of Florida even today. And where municipal laws do not explicitly provide for segregation in places of public accommodation, there are related laws. Thus, in addition to a rather recent regulation providing for segregation in bars and in restaurants serving liquor,^{127a} Baltimore City at one time or another decreed segregation in housing and

ent part: "No person shall give a public exhibition * * either on canvas or otherwise, of any prize fight * * * wherein the contestants * * * are persons of different races."

In 1917, the New Orleans, La., Commission Council adopted an ordinance prescribing a specific area of the city wherein Negro houses of prostitution could be maintained and prohibiting peripatetic Negro prostitutes from plying their trade in other parts of the city. New Orleans, La., Comm'n Council Ord. No. 4485 (1917).

¹²⁶ Southern Standard Building Code 1957-58, § 2002.1. See e.g., Spartanburg, S.C., City Code (1958), §§ 28-45, 28-76(a); Spartanburg Plumbing Code (1961), § 921.1.

¹²⁷ Fla. Adm. Code, ch. 170C, § 8.06. See *Bohler v. Lane* (S.D. Fla.), 204 F. Supp. 168, 172-173. The same practice obtained in Maryland until 1960. See *Jones v. Marva Theatres, Inc.* (D. Md.), 180 F. Supp. 49.

^{127a} See *DeAngelis v. Board* (Baltimore City Ct.), 1 R.R.L.R. 370 (1955), holding the regulation unconstitutional.

use of land,¹²⁸ in municipal parks and playgrounds¹²⁹ and in a free library.¹³⁰ Tampa, Florida, prohibits the operation of any "public inn, restaurant, or other place of public accommodation and refreshment" serving Negroes in a "white community," without the consent of a majority of the white residents.¹³¹ Until 1961, Jacksonville, in the same State, segregated buses¹³² and taxicabs,¹³³ and, for a time at least, expressly required separation of the races in all taverns.¹³⁴

While there are important variations from State to State, and even from one town to another, the basic pattern has been the same. Some communities, like those here involved, have not explicitly compelled racial segregation in places of public accommodation. Yet, there can be no doubt that each of the States at bar, until very recently, has encouraged those practices.

Here, as elsewhere, the official philosophy of the Negro's inferiority was affirmed in the legal defini-

¹²⁸ Ordinance #610, December 19, 1910; Ordinance #654, April 7, 1911; Ordinance #692, May 15, 1911; Ordinance #339, September 25, 1913.

¹²⁹ See *Boyer v. Garrett* (4th Cir.), 183 F. 2d 592, certiorari denied, 340 U.S. 912; *Law v. Mayor and City Council of Baltimore* (D. Md.), 78 F. Supp. 346; *Dawson v. Mayor and City Council of Baltimore City* (4th Cir.), 220 F. 2d 386, affirmed, 350 U.S. 877.

¹³⁰ *Kerr v. Enoch Pratt Free Library of Baltimore City* (4th Cir.), 149 F. 2d 212, certiorari denied, 326 U.S. 721.

¹³¹ Tampa City Code (1937), § 18-107.

¹³² Jacksonville City Code (1953), §§ 39-65, 39-70.

¹³³ *Id.*, §§ 39-15, 39-17.

¹³⁴ Jacksonville City Code (1917), § 439. While the provision is not incorporated in the more recent codes, no express repeal was found.

tion of the race, branding as "tainted" any person with so much as 1/8th Negro ancestry,¹³⁵ in the strict ban on interracial marriages,¹³⁶ and by a construction of the libel law which recognized it as an insult, actionable *per se*, to be wrongly called a Negro.¹³⁷ Here, as elsewhere, compulsory school segregation laws taught white children from the first that Negroes were inferiors and impressed on colored children that they were not fit to share a schoolhouse with the white. Here, as elsewhere, the State set an example by officially segregating all its own facilities. And here, as elsewhere, until very recent days, the story of segregation legislation has had only one direction, becoming ever more rigid and more pervasive, as though to give legal support to a threatened institution.

We do not mean to disparage the differences even among the former slave-holding States in their past and present laws dealing with segregation. Maryland's laws and official policies have been far less rigid than those of South Carolina. Some states have vehemently pursued an official policy of segregation, while others have taken first steps to adapt themselves to constitutional requirements: Louisiana's rigid insistence upon preserving segregation, which illustrates one extreme, is described at pages 59-78 of our brief

¹³⁵ Fla. Stat. § 1.01(6) (1961); Md. Code 27, § 398 (1957); S.C. Const. Art. III, § 33.

¹³⁶ Fla. Const., Art. XVI, § 24; Fla. Stat. 741.11-741.16 (1964); Md. Code (1957), Art. 27, § 398; S.C. Const., Art. III, § 33; S.C. Code § 20-7 (1962).

¹³⁷ See Annotation, 46 A.L.R. 2d 1287 (1956); *Bowen v. Independent Publishing Company*, 230 S.C. 509, 96 S.E. 2d 564.

in *Avent v. North Carolina* and companion cases (Nos. 11, 58, 66, 67, and 71, October Term, 1962). Although thirty States have equal public accommodations laws, neither respondents nor any of the States that promoted segregation have wiped the slate clean.¹³⁸

We are concerned with institutions—not with blame. If there is to be blame for the revival of the caste system in the face of the Thirteenth, Fourteenth and Fifteenth Amendments, it should rest upon the Nation. Our point is that the respondents and some sister States massively contributed to the system of segregation by laws and official action. Between State law and private custom there was a symbiotic relation; they nourished each other and together produced the institution.

There can be no doubt that the State laws discussed above contributed to the establishment and practices of segregation in places of public accommodation. The legislation requiring segregation in public conveyances and upon carriers came too close to restau-

¹³⁸ Thus, each of the respondent States still retains school segregation laws on its statute books. See note 87, *supra*. With respect to Florida, see, also, *Florida ex rel. Hawkins v. Board of Control*, 347 U.S. 971, 350 U.S. 413, 355 U.S. 839. Segregation on common carriers remains the statutory law of Florida and South Carolina. Fla. Stat. (1958), §§ 352.03-352.18; S.C. Code (1962), §§ 58-714 through 58-720, 58-1331 through 58-1340, 58-1491 through 58-1496. South Carolina's law requiring segregated eating at station restaurants is still on the books. S.C. Code (1962), § 58-551. And all three States still prohibit miscegenation and interracial marriages. See Md. Code (1957), Art. 27, § 398; Fla. Stat. (1964), §§ 741.11-741.16; S.C. Code (1962), § 20-7. While Maryland has recently adopted a public accommodations law, it is expressly inapplicable to several counties of the State. Md. Laws 1963, ch. 227.

rants, theatres and other public places to have no influence upon them. No one can seriously argue that the South Carolina law requiring segregation in station restaurants and "eating houses" serving passengers¹³⁹ did not strengthen the practice of stigmatizing Negroes as inferiors by denying them the privilege of eating with whites; nor is it unlikely that the State law encouraged municipalities and licensing authorities to adopt similar local regulations.¹⁴⁰ Even as the discriminatory laws were being enacted, Florida and South Carolina were repealing earlier laws, applicable to places of public accommodation. The South Carolina laws of 1869 and 1870 banning racial discrimination by all licensed businesses were eliminated in 1887 and 1889.¹⁴¹ Florida followed suit in 1892,¹⁴² and, in 1957, expressly declared restaurants and hotels "private" establishments, free to exclude as they chose.¹⁴³ Such enactments cannot be read as legal abstractions. In the context of "private attitudes and pressures" toward Negroes at the time of their enactment a "repressive effect" was bound to follow the "exercise of

¹³⁹ S.C. Code (1962), § 58-551.

¹⁴⁰ We have already noticed ordinances in Greenville and Greenwood, S.C., requiring segregation in places of public accommodation. See notes 113-122, 124, *supra*.

¹⁴¹ See note 90, *supra*.

¹⁴² *Ibid.* Other States waited longer. See, e.g., La. Acts 1954, No. 194, repealing former La. R.S. 4:3-4 (originally La. Acts 1869, p. 37).

¹⁴³ See Fla. Stat. (1962) § 509.092. See, also, the statute involved in No. 60, Fla. Stat. (1962), § 509.141. Four other States (all former slave States) have comparable laws expressly permitting places of public accommodation to refuse service. Ark. Stat. Ann., § 71-1801; Del. Code Ann., § 24-1501; Miss. Code Ann. § 2046.5; Tenn. Code Ann. § 62-710.

governmental power." See *Anderson v. Martin*, No. 51, this term, decided January 13, 1964, slip opinion, p. 4.

One aspect of the inevitable interaction between segregation in restaurants and other aspects of the system finds a current illustration in Florida. As recently as 1962 the State Board of Health reissued a revised regulation requiring restaurants to provide separate toilet and lavatory rooms wherever colored persons are accommodated (Florida Administrative Code, Chapter 170C, Section 8.06).¹⁴⁴ Not only does this official statement of State policy promote the view that colored persons should be segregated from whites as inferiors, but it has the very practical consequence of discouraging restaurants from accommodating all members of the public equally. Excepting very large restaurants, the financial burden of providing duplicate facilities would be too heavy.

Institutionally, segregation in restaurants, lunch counters and amusement parks is part and parcel of the pervasive, official system of segregation which carries literally from cradle to grave.¹⁴⁵ If it were

¹⁴⁴ The substance of the earlier regulation was identical. See p. 2, *supra*. The text of the current regulation is set out at pp. 99-100, *infra*.

¹⁴⁵ See, e.g., the Louisiana pattern of laws set forth in the concurring opinion of Mr. Justice Douglas in *Garner v. Louisiana*, 368 U.S. 157, at 179-181. For similar laws elsewhere, see Murray, *States Laws on Race and Color* (1950), and Greenberg, *Race Relations and American Law* (1959), pp. 372-400. See, generally, Mangum, *The Legal Status of the Negro* (1940).

While there are not explicit statutes in each State for each activity, those set out below doubtless reflect the official view, at least until very recently, in the States at bar.

otherwise possible to view the practices reflected in the cases at bar as individual instances of truly private preference, that assumption becomes absurd in a community which until very recently required the Negro to begin life in a segregated neighborhood,¹⁴⁶ attending separate schools,¹⁴⁷ using segregated parks, playgrounds, swimming pools,¹⁴⁸ which later kept him apart at work,¹⁴⁹ at play,¹⁵⁰ at worship,¹⁵¹ even at court¹⁵² and while going from one place to another,¹⁵³ which confined him in segregated hospitals¹⁵⁴ and prisons,¹⁵⁵ and finally relegated him to a separate burial place.¹⁵⁶ It is this rigidity, this pervasiveness, which makes unique in the American context the discrimination against the Negro. There is no comparable instance in this country of a massive phenomenon which affects some 10 million people in every aspect of life. It has been infused with State support throughout its history.

¹⁴⁶ See, e.g., City Code of Spartanburg, S.C. (1949), § 23-51.

¹⁴⁷ See, e.g., Fla. Stat. (1961), § 228.09.

¹⁴⁸ See, e.g., the action of the City Commission of Miami directing the resegregation of municipal swimming pools, reported at 4 R.R.L.R. 1066.

¹⁴⁹ See, e.g., S.C. Code (1962), § 40-452, requiring separation in cotton textile factories.

¹⁵⁰ See, e.g., Emergency Ordinance No. 236 of the City of Delray Beach, Fla., reprinted in 1 R.R.L.R. 733 (1956), excluding Negroes from the public beaches.

¹⁵¹ See, e.g., City Code of Greenville, S.C. (1953), § 31-5.

¹⁵² See, e.g., *Johnson v. Virginia*, 373 U.S. 61.

¹⁵³ See, e.g., City Code of Greenville, S.C. (1953), § 34-12.

¹⁵⁴ Md. Code Ann. (1939), Art. 59, § 61.

¹⁵⁵ See, e.g., Fla. Stat. (1960), §§ 950.05-950.08; Md. Code (1957), Art. 78A, § 14.

¹⁵⁶ See, e.g., City Code of Danville, Va. (1962), § 18.13.

II

FOR A STATE TO GIVE LEGAL SUPPORT TO A RIGHT TO MAINTAIN PUBLIC RACIAL SEGREGATION IN PLACES OF PUBLIC ACCOMMODATION, AS PART OF A CASTE SYSTEM FABRICATED BY A COMBINATION OF STATE AND PRIVATE ACTION, CONSTITUTES A DENIAL OF EQUAL PROTECTION OF THE LAWS

We have shown that the refusal to allow Negroes to eat or mingle with whites in these places of public accommodation is a community-wide practice enforced, with State support where necessary, in places regulated by the States and heavily affected with a public interest, and that the practice is an integral part of a system of segregation established by a combination of governmental and non-governmental action and designed to preserve the very caste system that the Thirteenth, Fourteenth and Fifteenth Amendments sought to eradicate. We now submit the legal proposition that for a State to support that practice, either by arrests and criminal prosecution or by recognizing a privilege of self-help, violates the Fourteenth Amendment.

The argument is essentially that where racial discrimination becomes operative through a combination of State and private action the State's responsibility depends upon an appraisal of the significance of all the elements of State involvement in relation to the elements of private choice. Thus, while we stress the presence of the State in the arrests and prosecution, we do not urge that such State action in support of private discrimination is alone enough

to constitute a State denial of equal protection of the laws. Similarly, although it might be argued that the State's influence upon the system of segregation, of which discrimination in places of public accommodation is an integral part, is enough to bring the cases within the principle of *Peterson v. Greenville*, 373 U.S. 244, and *Lombard v. Louisiana*, 373 U.S. 267, we do not press the argument that far. We rely upon the State's antecedent involvement only as one of the elements in the total complex. Again, while we do not assert that a State violates the Fourteenth Amendment merely by failing to require the proprietor of a place of public accommodation to serve Negroes equally with other members of the public, we do nevertheless urge that the States' close association with such establishments through licensing and regulation constitutes a further element of State involvement and also indicates that the imposition of State responsibility would effectuate the basic purpose of the Thirteenth, Fourteenth and Fifteenth Amendments.¹⁵⁷

¹⁵⁷ It may be useful also to distinguish another line of analysis. There is considerable ground for arguing that the Fourteenth Amendment imposes upon the States a duty to provide equality of treatment under the law for all members of the public without regard to race in establishments which the proprietor voluntarily throws open to the general public to such an extent that legal protection of the public is a normal part of the legal system. Although there is little direct evidence, the history of the Reconstruction Period furnishes no little support for that thesis. In addition to materials cited at pp. 114-143 below, see Roche, *Civil Liberty in the Age of Enterprise*, 31 U. of Chi. L. Rev. 103, 107-112; Peters, *Civil Rights and State Action*, 3 Notre Dame Lawyer 303; cf. Harris, *The Quest for Equality* (1960), 42-43. The trend of constitutional

A. WHERE RACIAL DISCRIMINATION BECOMES EFFECTIVE BY CONCURRENT STATE AND INDIVIDUAL ACTION, THE RESPONSIBILITY OF THE STATE UNDER THE FOURTEENTH AMENDMENT DEPENDS UPON THE IMPORTANCE OF THE ELEMENTS OF STATE INVOLVEMENT COMPARED WITH THE ELEMENTS OF PRIVATE CHOICE.

Petitioners were convicted as a result of racial discrimination. There was discrimination when they were refused service. It became operative again when they were arrested, tried and convicted of crime. The

thinking after 1877 points in the opposite direction, but the decisions invalidating direct federal legislation do not require the latter conclusion because all appear to be based upon the absence of any showing that the State failed to provide a remedy for the alleged invasions of individual rights. In the *Civil Rights Cases*, 109 U.S. 3, the Court expressly assumed the availability of a State remedy. See pp. 73-77 below. In *United States v. Cruikshank*, 92 U.S. 542, apparently there was no allegation of a wilful default in State protection. *United States v. Harris*, 106 U.S. 629, 639-640, states that the gravamen of the charge was that the accused "conspired to deprive certain citizens of the United States and of the State of Tennessee of the equal protection accorded them by the laws of Tennessee." The Solicitor General's brief in the *Harris* case made no contention based upon a technical or practical lack of State protection.

If a State's failure to provide equal protection violates Section 1, then Congress, under Section 5, has power to enact legislation appropriate to securing the equality. In default of Congressional action the victims might lack a direct remedy, for the refusal of the proprietors could be distinguished from the default of the State, but certainly the Court would invalidate any State action, such as arrests and convictions, that enhanced the inequality which the State was constitutionally required to eliminate.

In view of the elements of affirmative State involvement present in these cases, we mention but do not pursue the foregoing line of analysis.

facts can hardly be disputed. Though one may argue the legal consequences, neither the State authorities nor this Court could blind itself to what all the world knows.

If the State, in addition to making the arrests and entering the convictions, had fixed the rule that no Negro should be served there would be a plain violation of the Fourteenth Amendment. If the State had never intervened, and had no duty to act,¹⁵⁸ there would equally plainly be no violation of constitutional rights. The difficulty in the present case is that the discrimination becomes operative through a combination of State and private action.

The resulting problem, though novel in the present particular, is not unfamiliar. In a complex society governmental and private action are increasingly often entwined as well as interdependent. The State acts in many forms and through many channels. Private activity may not only depend upon State permission and State sanctions, but it may benefit from or be stimulated by State subsidies, State regulation and other forms of aid or direction. The cases that have reached the courts are alone enough to demonstrate that invidious discrimination and interference with aspects of individual liberty are increasingly often the product of combinations of private and gov-

¹⁵⁸ We do not argue that there is such a duty. See pp. 9-10, 65, no. 157, 20-21, above.

ernmental action.¹⁹⁹ In such a situation there is no

¹⁹⁹ Cases where lessees of or buyers from the State have discriminated: *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (refusal to serve Negro in private restaurant located in public building and leased from the State); *Muir v. Louisville Park Theatrical Ass'n*, 347 U.S. 971, reversing and remanding 202 F. 2d 275 (C.A. 6) (municipally owned amphitheater leased to private association); *Jones v. Marva Theatres, Inc.*, 180 F. Supp. 49 (D. Md.) (city owned theater leased to private corporation); *Coke v. City of Atlanta, Ga.*, 184 F. Supp. 579 (N.D. Ga.) (city owned restaurant leased to private corporation); *Lawrence v. Hancock*, 76 F. Supp. 1004 (S.D. W. Va.) (city owned swimming pool leased to private corporation); *McDuffie v. Florida Turnpike Authority* (not officially reported, see 7 R.R.L.R. 505) (restaurant leased by private party from State turnpike authority); *Department of Conservation & Development v. Tate*, 231 F. 2d 615 (C.A. 4) (threatened lease of state park to private persons who would discriminate); *Smith v. Holiday Inns of America, Inc.*, 220 F. Supp. 1 (M.D. Tenn.) (private motel located on urban renewal land sold to proprietor who refused to accommodate Negroes); *Derrington v. Plummer*, 240 F. 2d 922 (C.A. 5) (refusal to serve Negroes in cafeteria leased from state and located in courthouse).

Cases where the State required or encouraged segregation by statute or official conduct: *Lombard v. Louisiana*, 373 U.S. 267 (refusal to serve Negro in private restaurant in city where public officials encouraged and recommended restaurant segregation); *Peterson v. Greenville*, 373 U.S. 244 (refusal to serve Negro in private restaurant in city where ordinance required restaurant segregation); *Gayle v. Browder*, 352 U.S. 903, affirming 142 F. Supp. 707 (M.D. Ala.) (State law requiring private common carrier to segregate passengers); *McCabe v. A.T. & S.F. Ry Co.*, 235 U.S. 151 (racial discrimination by railroad permitted by state law); *Turner v. City of Memphis*, 369 U.S. 359 (State law requiring segregation in private restaurant located in public airport).

Cases where private groups whose power to act derives from State or federal law discriminated: *Steele v. Louisville & N. R. Co.*, 323 U.S. 192 (federal law conferred exclusive

simple formula for distinguishing State denials of equal protection from individual invasions of the same interests.

Mindful of the variety and complexity of the forms of State action and their relation to racial discrimination and other invasions of fundamental rights, the Court has eschewed the "impossible task" of formulating fixed rules and has sifted the facts and weighed the circumstances of each case in order to attribute "its true significance" to "nonobvious involvement of the State in private conduct." *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 722.. "The ultimate substantive question is * * * whether the character of the State's involvement in an arbitrary discrimina-

bargaining rights on union which discriminated against Negroes).

Cases where the State delegated a governmental function to a private entity: *Terry v. Adams*, 345 U.S. 461 (delegation of election function by State to private group which excluded Negroes); *Smith v. Allwright*, 321 U.S. 149 (same); *Marsh v. Alabama*, 326 U.S. 501 (delegation by State of power to exclude religious solicitors from "company town" and conviction for trespass for refusal to leave).

Cases where the State was involved financially or otherwise in creating or maintaining the private entity which discriminated: *Simkins v. Moses H. Cone Hospital*, No. 8908 (C.A. 4, November 1, 1963) (private hospital refusing Negro patients pursuant to statutory authorization although hospital constructed under federal and state plan); *Smith v. Holiday Inns of America, Inc.*, 220 F. Supp. 1 (M.D. Tenn.) (private motel located on urban renewal land sold to proprietor who refused to accommodate Negroes); *Kerr v. Enoch Pratt Free Library*, 149 F. 2d 212 (C.A. 4) (large-scale public financial support of library which excluded Negroes).

tion is such that it should be held *responsible* for the discrimination." Mr. Justice Harlan concurring in *Peterson v. Greenville*, 373 U.S. 244, 249. The required judgment *upon the whole* seems not essentially different in method from the determination of other forms of legal liability for the results of mingled causes.

One of the guiding principles is that a State cannot exculpate itself merely by showing that a private person made the effective determination to engage in invidious discrimination or some other invasion of fundamental rights. Just as there may be two legal causes of injury to the person or property, so State and private responsibility are not mutually exclusive. There are numerous decisions, both in this Court and elsewhere, holding that a State has violated the Fourteenth Amendment where its participation facilitates or encourages discrimination but leaves the decision to private choice. In *Burton v. Wilmington Parking Authority*, 365 U.S. 715, the State was involved through ownership of the building and there was continuing mutual interdependence as well as association between the State parking facility and the private restaurant; the actual decision to exclude Negroes from the restaurant was made by the restaurant alone. In *Lombard v. Louisiana*, 373 U.S. 267, government officials encouraged the discrimination but the decision was private. Mr. Justice Harlan urged in dissent that the State involvement was insufficient if

the decision to discriminate was private, but his view was rejected by the Court.⁷

The principle is not confined to cases of racial discrimination. In *Railway Employees' Dept. v. Hanson*, 351 U.S. 225, the federal statute merely removed legal obstacles to private agreements which the parties might conclude or reject, but this was unanimously held sufficient to subject the consequences of the resulting agreements to scrutiny under the First and Fifth Amendments. Compare *Steele v. Louisville & N. R. Co.*, 323 U.S. 192; *International Ass'n of Machinists v. Street*, 367 U.S. 740. See, also, *Public Utilities Comm. v. Pollak*, 343 U.S. 451.

States have also been held responsible where their sole participation was to permit and carry out an exercise of private right. In the *Girard Trust* case the public authorities did no more than give effect to a private individual's testamentary instructions concerning the disposition and use of his property as a public trust. *Pennsylvania v. Board of Trusts*, 353 U.S. 230. The State, through a municipal subdivision,

¹⁴⁰ See, also, *Baldwin v. Morgan*, 287 F. 2d 750 (C.A. 5) (signs designating "white" and "colored" terminal waiting rooms unlawful despite lack of enforcement since signs encourage segregation); *Kerr v. Enoch Pratt Free Library*, 149 F. 2d 212 (C.A. 4) (library supported mainly with public funds); *Simpkins v. Moses H. Cone Hospital*, C.A. 8908 (C.A. 4, November 1, 1963) (private hospital constructed with federal funds according to state plan and authorized by law to discriminate); *Derrington v. Plummer*, 240 F. 2d 922 (C.A. 5) (leased restaurant in courthouse building); *Department of Conservation & Development v. Tate*, 231 F. 2d 615 (C.A. 4) (lease of state park to private persons); *Smith v. Holiday Inns of America, Inc.*, 220 F. Supp. 1 (M. D. Tenn.) (sale of urban renewal land to private motel corporation).

was continuously and intimately involved because it acted as trustee; the element of individual freedom was diluted by the lapse of a century since the testator's death; but the fact remains that the State was only giving effect to a private decision. *Shelley v. Kraemer*, 334 U.S. 1, is still closer to the point for there the State action consisted solely of a legal system which recognized a private right to negotiate covenants running with the land and which enforced such private covenants even when racially discriminatory. Manifestly, there would have been no racial discrimination but for the private choice; and the State did nothing to encourage it. The core of the decision appears to be the judgment that, in that instance of discrimination, which was a product of private contract combined with jural recognition, the elements of law were so significant in relation to the elements of private choice as to require the conclusion of State, as well as private responsibility. See pp. 88-89 below. Accord: *Barrows v. Jackson*, 346 U.S. 249.¹⁰¹

¹⁰¹ It may be suggested that in the *Girard Trust* case the State was required to determine whether an applicant was white or Negro, and that in *Shelley v. Kraemer* and other cases of restrictive covenants the State gave judgment to the plaintiff only after satisfying itself of the race of the prospective purchaser; whereas in the present cases, the States were evicting the persons deemed objectionable by the managers without the States' inquiring into race or color. Other cases show this difference to be unimportant. In *Peterson and Lombard*, as here, the State could say that it proceeded against persons identified as objectionable by the managers without asking their race or color. While those cases can be distinguished on the ground that the vice was anterior State intervention looking to race, the distinction is not applicable to *Burton*, where the State could have proved a criminal tres-

There is nothing to the contrary in the *Civil Rights Cases*, 109 U.S. 3, even though they deal with discrimination in places of public accommodation. There the State was not involved in the discrimination either by action or inaction. In issue was the power of Congress under the Thirteenth and Fourteenth Amendments to require the operators of inns, public conveyances, theatres and other places of public amusement to make their facilities equally available to citizens of every race and color, even though there was no showing that the State law failed to secure such rights. The decision was that Congress lacked power to enact the legislation (*id.* at 13).

* * * until some State law has been passed, or some State action through its officers or agents has been taken, adverse to the rights of citizens sought to be protected by the Fourteenth Amendment, no legislation of the United States under said amendment, nor any proceeding under such legislation can be called into activity; for the prohibitions of the amendment are against State laws and acts done under State authority.

The refusal of service was then held to be only a private wrong against the argument that the carriers, inns and theatres involved were quasi-public concerns acting for the State. The predicate of the rul-

pass without showing Burton's color. In a case like *International Association of Machinists v. Street*, the reason for the employees' failure to pay dues would not have to be proved to invoke the union shop agreement; yet the employees were allowed to offer the proof in challenging the constitutionality of the governmental action.

ing, however, was that the States not only gave no support to the discrimination but would afford the injured party a remedy.

Discussing in general terms the need for some State involvement to invoke the civil rights guaranteed by the Constitution, the Court reasoned that the wrong done by one individual to another did not impair the constitutional right because the individual aggressor, unless shielded by State law or State authority, "will only render himself amenable to satisfaction or punishment; and amenable therefor to the laws of the State where the wrongful acts are committed" (109 U.S. at 17). Coming to the Civil Rights Act of 1875, the Court assumed that "a right to enjoy equal accommodation and privileges in all inns, public conveyances, and places of public amusement, is one of the essential rights of citizens which no State can abridge or interfere with." It observed that, far from positing State failure to secure those rights, the Act of 1875 (*id.* at 19)—

supersedes and displaces State legislation on the same subject, or only allows it permissive force. It ignores such legislation and assumes that the matter is one that belongs to the domain of national regulation.

The rather plain implication that the Court knew, or at least assumed the States to have laws protecting the very rights in question was made explicit shortly after (*id.* at 25):

Innkeepers and public carriers, by the laws of all the States, so far as we are aware, are bound, to the extent of their facilities, to fur-

nish proper accommodation to all unobjectionable persons who in good faith apply for them.

The same understanding, including also places of amusement, is the predicate of the key passage expressing in the form of a rhetorical question the Court's final judgment upon the issue of State responsibility for the allegedly individual acts of discrimination (*id.* at 24):

Can the act of a mere individual, the owner of the inn, the public conveyance or place of amusement, refusing the accommodation, be justly regarded as imposing any badge of slavery or servitude upon the applicant, or only as inflicting an ordinary civil injury, *properly cognizable by the laws of the State, and presumably subject to redress by those laws until the contrary appears?* [Emphasis added.]

The foregoing passages appear essential to the Court's reasoning. Justice Bradley, who wrote the opinion, had earlier expressed in private correspondence the view that the Fourteenth Amendment laid upon the States an affirmative obligation to secure equality for the freedmen, including the duty to enact protective legislation. Although he later modified his view—but not in relation to businesses normally under a duty of public service—still there is no indication that he was slow to find State involvement.¹⁶²

¹⁶² 44* * * Congress has a right, by appropriate legislation, to enforce and protect such fundamental rights, against unfriendly or insufficient State legislation. I (?) say unfriendly or insufficient; for the XIVth Amendment not only prohibits the *making or enforcing of laws* which shall *abridge* the privileges of the citizen; but prohibits the states from *denying* to all persons within its jurisdiction the equal protection of the laws. *Deny-*

The assumption that State law, evenly administered, would usually provide redress for the denial of access to the inns or hotels, carrier, opera house and theatre was not unreasonable. The common law covered most situations within the Act. Many States were enacting still broader equal public accommodation laws.¹²¹ Of

ing includes inaction as well as action. And denying the equal protection of the laws includes the omission to protect, as well as the omission to pass laws for protection." From an unpublished draft of a letter by Justice Bradley to Circuit Judge (later Justice) William B. Woods, March 12, 1871, on file, The New Jersey Historical Society, Newark, New Jersey. Attached to the drafts of two letters, including the one to Judge Woods, was a note by Justice Bradley stating: "The views expressed in the foregoing letters were much modified by subsequent reflection, so far as relates to the power of Congress to pass laws for enforcing social equality between the races."

The most convenient source of the pertinent excerpts from the Bradley Papers is *Roche, Civil Liberty in the Age of Enterprise*, 31 U. of Chi. L. Rev. 103, 108-110.

¹²¹ See, for instance: Acts and Resolves of Massachusetts, 1865, ch. 277, p. 650 (no distinction, discrimination or restriction on account of race or color in any licensed inn, public place or amusement, public conveyance, or public meetings); *Ibid*; Jan. sess., 1866, p. 242 (theatres) (Stephenson, *Race Discriminations in American Law* (1910), p. 112.)

New York Statutes, IX, pp. 583-84 (prohibition of race distinctions in inns, public conveyances, theaters, other public places of amusement, common schools, public institutions of learning, cemeteries) (Stephenson, p. 115).

Laws of Florida, 1873, chapt. 1947 (prohibited discrimination on account of race, color, or previous condition of servitude in full and equal enjoyment of the accommodations of inns, public conveyances, licensed theaters, other places of public amusement, common schools, public institutions of learning, cemeteries, benevolent associations supported by general taxation) (Stephenson, pp. 115-116).

Acts of Louisiana, 1869, p. 37; 1870, p. 57 (prohibited discrimination on account of race or color by common carriers,

the five cases before the Court, two involved plain violations of a State statute and two may well have been covered by the common law. Only in one instance—the case involving refusal of a parlor coach seat on a railroad in Tennessee—is it probable that the State would have denied redress, and plainly the Court did not examine that case separately to ascertain whether the State had sanctioned discrimination.¹⁴⁴

inkeepers, hotel keepers, keepers of public resorts.); *Id.*, 1873, pp. 156-57 (provided that all persons, without regard to race or color must have "equal and impartial accommodations" on public conveyances, in inns, and other places of public resort) (Stephenson, p. 116).

Acts of Arkansas, 1873, pp. 15-19 (same accommodations to be furnished to all by common carriers, keepers of public houses of entertainment, inns, hotels, restaurants, saloons, groceries, dram-shops or other places where liquor was sold, public schools, and benevolent institutions supported in whole or in part by general taxation) (Stephenson, p. 116).

See also notes 19, 83-85, *supra*; notes 228-236, 241-243, *infra*.

¹⁴⁴ *United States v. Stanley* involved a Kansas inn (hotel). Probably it was covered by the common law but Kansas Laws 1874, p. 82, specifically barred racial discrimination.

United States v. Ryan, involved a California theatre. The earliest legislation prohibiting discrimination in theatres was Laws 1893, p. 220. See also, Laws 1897, p. 137. However, the common law duty was extended broadly; for example, to a watering place. See *Willis v. McMahon*, 89 Cal. 156 (1891).

In *United States v. Nichols*, the Missouri inn or hotel was presumably subject to the common law duty. Indeed, in his brief in the *Civil Rights Cases*, the Solicitor General said: "I premise that upon the subject of inns the common law is in force in Missouri * * *." Brief for the United States, Nos. 1, 2, 4, 460, Oct. Term, 1882, p. 8.

United States v. Singleton involved the New York opera house. A State statute barred racial discrimination by "theatres or other places of amusement." Laws 1873, p. 303; Laws 1881, p. 541.

The basic distinction between State and private action, stemming from the *Civil Rights Cases*, has important implications in determining what degree of State involvement will carry State responsibility for the purposes of the Fourteenth Amendment. See pp. 84-88 below. The cases hold, however, only that the Amendment gives the federal Congress no power to deal with individual wrongs (not affecting interstate commerce) where there is no State involvement hostile to the right to equal treatment and where State law is available to secure redress. As we read the facts and the opinion, the cases do not even reach the question whether the State is sufficiently involved for there to be a violation of the Fourteenth Amendment when the State fails to secure a right of equal treatment in places of public accommodation. *A fortiori* those decisions do not deal with State recognition of, and sanctions for, an asserted private right to evict Negroes from places of public accommodation as members of an untouchable caste. *A multo fortiori* they do not deal with the only question here—State recognition and sanctions for discrimination in public places where the racial practices of the

Robinson v. Memphis, etc. R.R. was a private suit growing out of the refusal of accommodations in a railroad parlor coach. The common law duty seems plain but Tennessee Laws 1875, p. 216, expressly repealed the common law rule. Laws 1881, p. 211, however, amended the 1875 statute to require a carrier to furnish separate but equal first class accommodations. The pertinent dates in the *Robinson* case do not appear in the official report, but the Court stated that, as far as it was aware, the public carrier was bound to furnish equal accommodations. 109 U.S. at 25.

proprietors are an integral part of a system of segregation, as a mark of caste, which was adopted and promoted by a mixture of governmental and private action.

There are no other decisions in this Court even arguably inconsistent with our submission that where racial discrimination becomes operative through State and individual action, the State cannot insulate itself from responsibility merely by showing that the decision to discriminate was private. In such a situation, as in other instances of intermingled State and private action, the judgment depends, in the last analysis, upon the size and importance of the elements of State involvement in relation to the elements of private action, both measured from the standpoint of the fundamental aims of the constitutional guarantee.

In the present cases the elements of State involvement, measured from that standpoint, outweigh the elements of private action. The State is involved through the arrests and prosecution, where the effect was to enforce the community-wide stigma in virtually all places of public accommodation. The State is also involved because, in weaving the fabric of forced segregation as a means of preserving a caste system, its laws and official policies helped to fill the warp laid down by private prejudice. The State is intimately associated with systematic racial discrimination in places of public accommodation because it has traditionally assumed responsibility over their duties to the public to which they open their business, and the State actually regulates most aspects of the relation-

ship. Conversely, the special character of these establishments emphasizes the minimal significance of the elements of private choice.

We elaborate these points in the next section.

B. IN THE PRESENT CASES THE ELEMENTS OF STATE INVOLVEMENT ARE SUFFICIENTLY SIGNIFICANT, IN RELATION TO THE ELEMENTS OF PRIVATE CHOICE, TO CARRY RESPONSIBILITY UNDER THE FOURTEENTH AMENDMENT.

1. *The States are involved through the arrest, prosecution and conviction of petitioners*

It is beyond dispute that the respondents have provided official sanctions for the imposition of a racial stigma through the intervention of the police, the prosecutor and the courts. While any proprietor is legally free to abandon the practice of racial segregation, the substantial effect of the States' intervention, in support of the community-wide practice whenever it is challenged, is to give the practice the force of law insofar as Negroes are concerned, much as if it were an ordinance forbidding Negroes to enter and seek service in any restaurant or lunch counter where whites are eating. Respondents may not deny knowledge of what all the world knows—that they are prosecuting those whose sole offense was peacefully to insist on being treated like other members of the public in a place to which the general public was invited. Cf. *Child Labor Tax Case*, 259 U.S. 20, 37; *United States v. Rumely*, 345 U.S. 41, 44.

Before turning to the other elements of State involvement, it is important to digress, first to empha-

size; that we would equate police intervention and criminal prosecution with any State recognition of a legal privilege to engage in aggression against a Negro who has peacefully entered and peacefully seeks the same service the proprietor is offering to the public at large, and second, to mark the limits to our reliance upon the arrests and judicial proceedings.

(a) We are not contending that the intervention of the police and the subsequent convictions are a *sine qua non* of State involvement. If the State is involved when it supplies sovereign or physical power in the form of a policeman, the State must be involved when it gives the proprietor the privilege to use force as his own policeman. The reasoning that interdicts State action in the form of arrests and criminal prosecution, when sufficiently associated with the other elements of State involvement as in the present cases, is equally applicable to any jural recognition of a privilege to engage in private aggression. State action for the purposes of the Fourteenth Amendment may take the form of judge-made law as well as legislation. *American Federation of Labor v. Swing*, 312 U.S. 321; *Cantwell v. Connecticut*, 310 U.S. 296.

We distinguish here between (i) the State's failure to impose an affirmative duty, thus leaving the proprietor of the place of public accommodation free to refuse service, and (ii) the State's creation of a privilege authorizing the proprietor to invade what would normally be the protected interests of another, notably the interest in bodily security. The former

implies indifference. The latter puts the State's *imprimatur* upon the aggression.¹⁶⁵

In our view, therefore, the Supreme Court of Delaware erred in *State v. Brown*, 195 A. 2d 379, in saying that the proprietor of a place of public accommodation has a privilege of using reasonable force to remove Negroes from his establishment pursuant to a policy of racial discrimination. If the Negro seeks police assistance or sues for a battery, State law becomes no less involved than when the proprietor invokes its assistance. The normal rule is that the State will give relief against personal aggression. To make an exception, based upon the proprietor's decision to enforce the community's caste system, is no less a State denial

¹⁶⁵ The foregoing distinction does not involve the complexity present in *Rice v. Sioux City Memorial Park Cemetery*, 347 U.S. 942, and *Black v. Cutter Laboratories*, 351 U.S. 292. In those cases the party complaining of deprivation of constitutional rights had no cause of action unless based upon contract—the contract for the cemetery lot in one case and the promise not to discharge without just cause in the other. The defendant was asserting an exception—the clause excluding non-Aryans in the one case and the supposed reservation, written in by the State court, making Communist affiliations ground for discharge, in the other. Thus, the argument for respondents was essentially that no more State action was involved in the refusal to excise part of the contract and enforce the remainder than in standing entirely aside. The dissenting Justices concluded that there was a distinction. See the dissenting opinion of Mr. Justice Douglas joined by the Chief Justice and Mr. Justice Black in *Black v. Cutter Laboratories*, 351 U.S. 292, 302.

of equal protection than substituting State assistance for private force.¹⁰⁸

Of course, no one has a privilege of self-help to gain service in a place of public accommodation or to enter by force over the owner's objection. The rule applies whether the refusal be rightful or wrongful. Even if the right exists (which we do not argue), it cannot be enforced by aggression.

These principles go far to meet any problem of maintaining public order that might be supposed to result from reversal of these convictions. Whoever first resorts to violence is guilty of a breach of the peace be he a Negro seeking to enter and obtain service or a proprietor seeking to evict him. The police may quell, and the State may punish, such disturbances of public order without discrimination. Any failure of public officials to act because of racial prejudice would be unconstitutional discrimination subject to redress under the Civil Rights Act, 28 U.S.C. 1343. *Lynch v. United States*, 189 F. 2d 476 (C. A. 5); *Catlette v. United States*, 132 F. 2d 902 (C. A. 4); *Picking v. Pennsylvania Railroad Company*, 151 F.

¹⁰⁸ The above principle was quickly recognized in cases involving restrictive covenants. Although the cases in this Court involved affirmative State action providing sanctions for the covenants, it was soon held that they were not available as a defense. *Clifton v. Puente*, 218 S.W. 2d 272 (Tex. Civ. App.); *Capitol Federal Savings & Loan Ass'n v. Smith*, 316 P. 2d 252 (S. Ct. Colo.) (action to quiet title).

2d 240 (C.A. 3). See, also, *Monroe v. Pape*, 365 U.S. 167.

In the absence of legislation by Congress the net result may be that some proprietors of places of public accommodation find themselves unable to evict Negroes whom they are unwilling to serve. The dilemma is of their own making. One who pursues a public calling in which he permits the general public to enter his premises is hardly in a position to complain of the incongruity if he then refuses upon invidious grounds to serve some members of the same public to which he opened his business. Though only legislation can provide a complete solution, the resulting stand-off is no more likely, in our judgment, to result in demonstrations and disturbances than a decision rejecting the argument we have presented.

(b) In arguing that the State's provision of legal sanctions is an element of State involvement pointing towards State responsibility, we do not urge that such State action is always enough to implicate the State for the purposes of the Fourteenth Amendment, leaving for analysis only the question whether the result conforms to the substantive requirements of the Fourteenth Amendment (i.e., involves an invidious classification or a deprivation of other fundamental rights).¹⁶⁷

¹⁶⁷ Henkin, *Shelley v. Kraemer*, Notes for a Revised Opinion, 110 U. Pa. L. Rev. 473 (1962); Horowitz, *The Misleading Search for "State Action" Under the Fourteenth Amendment*, 30 So. Cal. L. Rev. 208 (1957); Van Alstyne and Karst, *State Action*, 14 Stan. L. Rev. 3 (1961). Cf. Williams, *The Twilight of State Action*, 41 Texas Law Review 347 (1963).

The latter argument seems to invite sharp curtailment of the scope for State and private choice and would certainly increase the role of constitutional adjudication.

To hold that a householder, lawyer or businessman may admit or exclude guests at his absolute discretion, however wise, capricious or immoral, but that he may not look to public authority to safeguard the right where the State could not constitutionally make the same choice, would deny the right to the poor and powerless and invite the rich or strong to recall the age of private armies. Manifestly, the same is true of business premises and a wide variety of places maintained by institutions such as schools, colleges, and charitable institutions. The constitutional doctrine expounded in *State v. Brown*, 195 A. 2d 379, also raises grave prospects of public disorder, for we feel no confidence that the owners of places of public accommodation would not be challenged and then exercise a privilege of self-help.

One escapes the latter difficulty, but only at the expense of increasing the former, by saying that a State acts not only through its police, prosecutors and judicial commands but also when its law recognizes a right, privilege or immunity; and that recognition of a privilege of self-help would therefore violate the Amendment. We agree that recognition of a privilege of self-help, like the intervention of the police, is indubitably State action (see pp. 20, 81-84 above), but to say that either form of State action is alone enough to make the State responsible for the private person's discrimination would subject a wide

variety of heretofore private decisions to the limitations of the Fourteenth Amendment as if they were made by the government. May a lawyer select clients, and a doctor patients, whimsically or only upon reasonable grounds? May a private school, endowed by its founders as a charitable corporation for the education of Episcopalians, prefer applicants of that faith over Jews or Roman Catholics? May it terminate the tenure of a teacher who avows atheism? May a popular distributor of detergents discharge an executive whose speeches and political associations with right or left wing extremists, in the judgment of the management, injure its public relations? Would the case be different if there were no risk of injury to the business but the other executives found the association highly distasteful? A State could not constitutionally command such discrimination and interference with individual freedom. Must its law therefore withhold all legal recognition of the right of private persons to engage in them?

The extent of such difficulties would depend upon whether the rule was that the State is responsible under the Fourteenth Amendment whenever its law failed to protect the claimed constitutional right, i.e., did not impose a legal duty upon others in favor of the claimant; or only when the State recognized a privilege to take aggressive action. We consider the distinction significant (see pp. 65, 81-84 above), but we do not pause to consider it in this context because it is clear that the withholding of criminal sanctions, civil remedies and the privilege of affirmative self-help would greatly reduce the field for private choice.

Of course, the State would be required to withhold recognition of a right of private choice only when the ensuing discrimination or interference with other fundamental interests is not counterbalanced by a constitutional interests of the actor equal to that which he has invaded, such as the householder's constitutional right of privacy, which would include the right to choose his guests. For although there is State responsibility in such case, it is said, the State is barred only from arbitrary and capricious action.¹⁶⁸

If the requirement of a counterbalancing interest of constitutional magnitude is seriously proposed, then the contention is really that wherever a State can legislate to prohibit discrimination or to secure civil liberties, the issue cannot be left to private choice without offending the Amendment. If other interests will suffice, the substantive restriction upon private action is less severe, but there remains the difficulty that imposing State responsibility upon the basis of jural recognition of a private right turns all manner of private activities into constitutional issues, upon which neither individuals nor the Congress nor the States—but only this Court—could exercise the final judgment.

The preservation of a free and pluralistic society would seem to require substantial freedom for private choice in social, business and professional associations. Freedom of choice means the liberty to be wrong as well as right, to be mean as well as noble, to be vicious as well as kind. And even if that view

¹⁶⁸ See Henkin; *op. cit. supra*.

were questioned, the philosophy of federalism leaves an area for choice to the States and their people, when the State is not otherwise involved, instead of vesting the only power of effective decision in the federal courts.

Nothing in the Court's decisions or elsewhere in constitutional history suggests that the Fourteenth Amendment's prohibitions against State action put such an extraordinary responsibility upon the Court. It seems wiser and more in keeping with our ideals and institutions to recognize that neither the jural recognition of a private right nor securing the right through police protection and judicial sanction is invariably sufficient involvement to carry State responsibility under the Fourteenth Amendment.

To go to the other extreme and hold that State sanctions for private choice are irrelevant to the question of the State's responsibility is untenable upon both precedent and principle. See pp. 67-72 above. "Only by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance" (*Burton v. Wilmington Parking Authority*, 365 U.S. 715, 722).

We read *Shelley v. Kraemer* as an instance of this moderate view. The more extreme argument may find support in some language in the opinion and has been espoused by a few commentators¹⁶⁹ and two State courts,¹⁷⁰ but in our view the decision rests more

¹⁶⁹ See n. 167, *supra*.

¹⁷⁰ *State v. Brown*, *supra*; *Abstract Investment Co. v. William O. Hutchinson*, 22 Cal. Repr. 309 (D.C. App. 2d Dist., 1962).

solidly upon narrower grounds. The elements of law involved in the enforcement of restrictive covenants running with the land greatly outweigh any elements of private choice. The sting of restrictive covenants is the power to bind unwilling strangers to the initial transaction. Nor are they typically found in isolation. Their function is to cover whole neighborhoods. The developer of a housing tract and his immediate grantees who execute the covenants have usually scattered long before enforcement of their covenant is sought by newcomers in the neighborhood against a willing buyer and willing seller who are strangers to the original transaction. The series of covenants becomes in effect a local zoning ordinance binding those in the area subject to the restriction without their consent. *Cf. Buchanan v. Warley*, 245 U.S. 60. Where the State has delegated to private persons a power so similar to law-making authority, its exercise may fairly be held subject to constitutional restrictions. Essentially the same principle has been applied in quite different contexts. *E.g., Railway Employees' Dept. v. Hanson*, 351 U.S. 225; *cf. Steele v. Louisville & N. R.*, 323 U.S. 192; *International Ass'n of Machinists v. Street*, 367 U.S. 740.

In *Shelley v. Kraemer* there were no elements of State involvement except the force that State law gave to private covenants. The State was found to be significantly involved, however, because the elements of law bulked large, for the reasons just stated, in relation to the elements of private freedom. A similar argument might be made in the present case. We do

not rely upon it, however, or even urge that the provision of criminal sanctions for an exercise of normal private choice is ever enough, standing by itself, to implicate the State in a denial of equal protection. For in the present cases there are two additional elements of State involvement.

2. *The States are involved in the practice of discriminating against Negroes in places of public accommodation because of their role in establishing the system of segregation of which it is an integral part*

For many years the States commanded segregation on a wide front. Between official policy and the prejudices and customs of the dominant portions of the community there was a symbiotic relation. The prejudices and customs gave rise to State action. Legislation and municipal ordinances, as well as executive policy, confirmed and strengthened the prejudices, and often forbade individual variations from the solid front. We summarized these elements of State involvement at pages 40-63 above.

Peterson v. Greenville, 373 U.S. 244, and *Lombard v. Louisiana*, 373 U.S. 267, establish the principle that a State is responsible for discrimination which it has commanded or officially encouraged even though segregation might be the proprietor's choice if uninfluenced. Where the discrimination is the product of a combination of State and private action, the State cannot disclaim responsibility upon the ground that the discrimination would have occurred even though the State had stayed its hand.¹⁷¹

¹⁷¹ Compare the familiar rule applicable to joint or concurrent tortfeasors. Prosser, *Torts* (1941 ed.), pp. 323-325, 330.

In the present cases there are no laws commanding segregation in these places of public accommodation. The State's encouragement of the system is more remote in time and place, and in its influence upon the conduct of the proprietors.¹⁷² Nevertheless, the State's prior involvement is material in determining its responsibility for the discrimination inherent in the challenged convictions. Having shared in the creation of a practice depriving Negroes of the kind of equality the Fourteenth Amendment was intended to secure, the State should not be free to turn its back and deny involvement through the momentum its action has generated. The law is filled with instances of liability for the consequences of negligent or wrongful acts until the connection between the wrong and the consequences becomes too attenuated.

In one sense, every event forever influences the course of history. A boy throws a stone into a pond; the ripples spread; the water level rises; the history of that pond is forever altered. We urge no such doctrine. Our view is that here, as with personal liability for the consequences of wrongful conduct, the issue "is always to be determined on the facts of each case upon mixed considerations of logic, common sense, justice, policy, and precedent." 1 Street, *Foundations of Legal Liability* (1906) 110. The necessity for judgment is inescapable. The question is whether a State's previous action still carries a momentum making it a "substantial factor" in the cur-

¹⁷² But see Florida Administrative Code, Chapter 170C, Section 8.06, discussed pp. 2-3, 62 above and pp. 99-100 below.

rent practice of discrimination which the State is now helping to enforce. Cf. *Restatement Torts*, § 431. Here the State's previous action was so massive and continued so long as to leave no doubt that the official policy still exerts substantial influence upon the customs of the community.

Nor is the question one of fault. Even one who without fault puts another in a position of exposure to injury has a duty to act to prevent the danger from eventuating or to minimize the damage if harm occurs. *Simonsen v. Thorin*, 120 Neb. 684, 234 N.W. 628; *Slavin v. State*, 249 App. Div. 72, 291 N.Y. Supp. 721; *Restatement Torts* § 321. One who makes an innocent misrepresentation must communicate the truth to the recipient as soon as he learns that the representation was false. Prosser, *Torts* (1941 ed.), p. 723; *Restatement Torts* § 551(2). Similarly, until time and events have attenuated that connection, the State continues to bear constitutional responsibility for the conditions it has shared in creating by branding Negroes as an inferior caste.

Again, the point must not be pressed too far. We do not say that prior State support for the system of racial segregation always makes the proprietor's action State action, or even that the involvement shown here would alone carry State responsibility. There are other important elements of State involvement in these cases, and we rely upon them equally. What we do say here is that the past legislation has constitutional materiality because its momentum is still substantial in the realm of public accommoda-

tions. To that extent, a State which has drawn a color line may not suddenly assert that it is color blind.

3. *The States are involved in the discrimination because of their traditional acceptance of responsibility for, and detailed regulation of, the conduct of the proprietors of places of public accommodation towards the general public to which they have opened their businesses*

Petitioners were convicted of trespass for remaining in establishments which the proprietors had thrown open to the general public whose patronage they solicited. The invitation ran to the general public. There is no other way to describe it, unless it be to say that the invitation was to all members of the public except Negroes, and not even the proprietors were willing to announce their policies publicly in that fashion.¹⁷³ The invitation is a critical element in several aspects of the cases,¹⁷⁴ but not least because the resulting concern of the State brings important elements of State involvement.

¹⁷³ The record in each of these cases shows that there was no public notice at the entrance or similar announcement that Negroes would not be served. No. 6, R. 44-46; No. 9, R. 20, 37; No. 10 (no evidence of any sign or notice); No. 12 (policy communicated only by oral statements), R. 23-24, 27-28; No. 60, R. 15-17, 19.

¹⁷⁴ The discrimination occurs in a public place which is part of the normal public life of the community. The opening of the premises to public use gives the resulting relationship that casual and evanescent nature that distinguishes it from virtually all others. The proprietor who thus opens his premises thereby subjects himself to a greater degree to the constitutional rights of others. See pp. 12-13, 17, 19-20, 29-36, *supra*, and 104-111, *infra*.

(a) At common law those who engaged in such callings had a duty to serve all members of the public equally to the limits of their capacity. Special rules were applicable to their rates and liability. Such was the innkeeper who, if he had available room, could not refuse to receive a guest who was ready and able to pay him a reasonable compensation. *White's Case* (1558) 2 Dyer 158b; *Warbrook v. Griffin* (1609), 2 Brownl. 254; *Lane v. Cotton* (1701), 12 Mod. 472; *Bennett v. Mellor* (1793), 5 Term R. 273; *Thompson v. Lacy* (1820), 3 Barn. & Ald. 283; see, generally, Storey, *Bailments*, §§ 475, 476 (7th ed., 1863); 5 Bacon, *Abridgement of the Law—Inns and Innkeepers*, pp. 230, 232 (1852); 3 Blackstone, *Commentaries*, p. 166 (Lewis ed., 1897). But the list was not so limited; at one time or another it apparently included the common carrier, the miller, the ferryman, the wharfinger, the baker, the farrier, the cartman and the hackney-coachman each of whom, it was said, "pursues a public employment and exercises 'a sort of public office.'" See *Munn v. Illinois*, 94 U.S. 113, 131-132. We do not urge the discountenanced argument that such establishments are *per se* State instrumentalities (*Civil Rights Cases, supra*),¹⁷⁵ but say only that the State's traditional relation to businesses that hold themselves and their premises out to the public at large distinguishes other business activities and puts the businesses affected with a public interest in a segment of community life where the relationship between proprietor and customer is less a product of

¹⁷⁵ But see Mr. Justice Douglas concurring in *Lombard v. Louisiana*, 373 U.S. 267, 274, 281-282.

contract or voluntary association than of the legal system.

Indeed, it is a fair inference that in a relationship so dominated by law, rather than contract or private choice, the State, if it did not approve the practice, would require its abolishment. Compare *Public Utilities Comm. v. Pollak*, 343 U.S. 451, 462. The inference is confirmed by experience. During the debates upon civil rights measures between 1865 and 1880 it seems to have been assumed that such businesses had a duty to serve all members of the public not subject to racial disabilities, and that the guarantee of equal protection therefore would secure the same right for Negroes.¹⁷⁶ This Court made the assumption in the *Civil Rights Cases*.¹⁷⁷ During that same period equal public accommodations laws were widely adopted outside the former slave-holding States.¹⁷⁸ They fell into comparative desuetude during a period of indifference to civil equality but are effective in thirty States today.¹⁷⁹ The course of events in two of the three States at bar is even more illustrative. South Carolina and Florida both enacted equal public accommodations laws in the period prior to the *Civil Rights Cases*, but repealed them later.¹⁸⁰ The Florida State Board of Health is presently enforcing an order requiring separate wash rooms and toilet facilities for whites and Negroes.

¹⁷⁶ See pp. 123-136, *infra*.

¹⁷⁷ See pp. 73-77, *supra*.

¹⁷⁸ See nn. 19, 163, *supra*.

¹⁷⁹ See n. 22, *supra*.

¹⁸⁰ See notes 84, 85, 90.

From this standpoint it is irrelevant that the States have chosen not to subject restaurants, amusement parks and similar establishments to the duty of inns and common carriers to serve all members of the public without discrimination. The class of "businesses affected with a public interest" is not closed for constitutional purposes. Restaurants and amusement parks, like inns and public conveyances, hold themselves out to the general public and open up their premises for public use. This characteristic distinguishes them from the many other activities which the State may constitutionally regulate because of their effect upon the general welfare but which do not involve opening the business or premises to the public. For our argument is not that the State is constitutionally responsible for all non-governmental action which it has the power to prevent,¹⁸¹ but only that its traditional supervision of the special class of businesses whose relation to the public is largely defined by law quickens the readiness to find responsibility through other elements of State involvement.

(b) The detailed State supervision over the establishments in which petitioners were arrested constitutes an element of State involvement. For where a State regulates most aspects of a business's relation-

¹⁸¹ To say that the possession of State powers to prohibit any private discrimination which would be invidious in a State official is enough to render the State responsible under the Fourteenth Amendment would raise grave concern about the possibility of preserving a distinction between public and private action. There are few activities or institutions in which a State lacks power to prohibit racial discrimination. Such a view of State action therefore raises, still more sharply, the difficulties raised by broad interpretations of *Shelley v. Kraemer*. See pp. 84-88 above.

ship to the general public to which it has opened its premises, the State can hardly say that it has no relation to the narrow segment in which it chooses to stay its hand.

In *Robinson v. Florida*, No. 60, petitioners were arrested in a Miami restaurant operated by Shell's City, Inc. The State has assumed pervasive responsibility for the conduct of restaurants towards the general public to which they have opened their premises. Chapter 509 of the Florida Statutes Annotated provides for the appointment of a Hotel and Restaurant Commissioner with power to inspect at least twice annually "every public lodging and food service establishment," and to issue such rules and regulations as may be necessary to carry out the chapter (Sec. 509.032). Chapter 509 itself establishes a detailed code of regulation for "public lodging establishments" and "public food service establishment." No restaurant may be operated without licenses from both the State and municipality (Sec. 509.271; Code of Miami, Chap. 35). Section 509.221 prescribes general sanitary measures and like requirements for protecting the public health, including plumbing, lighting, heating, ventilation and cooling. An infinitely more detailed set of regulations has been issued by the Commissioner. Florida Administrative Code, ch. 175-1, 175-2, 175-4. The State, County and City Boards of Health also appear to have jurisdiction.¹²²

¹²² Fla. Stat. Ann., Chs. 381, 154; Sanitary Code of Florida, ch. 170C-16; Dade County Code, § 2-77; Code of Miami, ch. 25; *A Manual of Practice for Florida's Food and Drink Services based on the Rules and Regulations of the Florida State Board of Health and State Hotel and Restaurant Commission*, published by the State Board of Health and State Hotel and Restaurant Commission, 1960.

Section 509.211 of the Florida Statutes prescribes safety regulations and requires all plans for the erection or remodeling of any building for use as a public food service establishment to be submitted for approval by the Hotel and Restaurant Commission.

The State's supervision extends beyond health and safety. For example, it covers representations concerning the food and other forms of advertising. Section 509.292 forbids misrepresenting "the identity of any seafood or seafood products to any of the patrons or customers of such eating establishments." The Commissioner, under his power to issue regulations, has prohibited the publication or advertisement of false or misleading statements relating to food or beverages offered to the public on the premises (Florida Administrative Code, Sec. 175-4.02). There is also general and ill-defined supervision over the character, and thus the practices, of the proprietors of public eating establishments. House Bill No. 86, approved May 16, 1963, authorizes the suspension or revocation of a restaurant's license when any person interested in its operation "has been convicted within the last past five years in this state or any other State, or the United States, of * * * any * * * crime involving moral turpitude." The Commissioner's regulations provide that licenses may be issued only "to establishments operated, managed or controlled by persons of good moral character," and the Commissioner is instructed to ascertain that "no establishment licensed by this commission shall engage in any misleading advertising or unethical practices as de-

fined by this chapter and all other laws now in force or which may be hereafter enacted" (Sec. 509.032).

Florida's official involvement goes still farther. The Commission's regulations require that "[a]chievement rating cards shall be conspicuously displayed." Florida Administrative Code, Sec. 175-1.03 The State has created an Advisory Council for Industry Education which employs a Director of Education for the lodging and food service industry whose basic role is "to develop and blend together an educational program offered for the entire industry." We do not know the details of the achievement rating program or of the work of the Advisory Council but, while they may not deal explicitly with racial discrimination, they undoubtedly cover every other aspect of the relationship between a "public food service" establishment and all members of the public.

Florida law even touches upon, although it does not deal directly with, discrimination in the selection of clientele. A related statute prohibits advertising that an establishment practices religious discrimination, although it permits similar advertisements of racial discrimination. Fla. Stat. (1962 Supp.), § 871.04. The State Board of Health has an outstanding regulation applicable to restaurants, which provides (Florida Administrative Code, Chapter 170C, Section 8.06):

Toilet and lavatory room shall be provided for each sex and in case of public toilets or where colored persons are employed or accommodated separate rooms shall be provided for their use. Each toilet room shall be plainly marked, viz.: "White Women," "Colored Men," "White

Men," "Colored Women;" *provided*, that separation based upon race shall be waived where such separation is determined to be in conflict with federal law or regulation.¹³³

The regulation plainly puts the State approval on racial discrimination. As a practical matter it encourages the exclusion of Negroes from restaurants that serve white persons by putting the proprietors of other establishments to the expense of supplying dual facilities.¹³⁴

A State that has so pervasively regulated the conduct of public food service establishments cannot disclaim association with the racial practices of their proprietors in the admission and exclusion of members of the public. The reason, we think, is this: Under most circumstances the Fourteenth Amendment permits a State to close its eyes to private conduct either upon the ground that the problem lacks sufficient public importance or because it should be left to the interplay of a free society. However, when widespread discrimination exists in businesses which have been thrown open to the general public by their proprietors and are being regulated by the State in pervasive detail, one can be reasonably certain that the State's failure to act results not from distaste for interference

¹³³ *A Manual of Practice for Florida's Food and Drink Services based on the Rules and Regulations of the Florida State Board of Health and State Hotel and Restaurant Commission*, published by the State Board of Health and State Hotel and Restaurant Commission, 1960, also sets forth this requirement (§ 4.6.7).

¹³⁴ This regulation alone may well be ground for reversing the convictions in the Florida case. See pp. 2-3 above.

with private determinations, but from a willingness to have the public discrimination continue. Compare *Public Utilities Comm. v. Pollak*, 343 U.S. 451, 462.

Whatever the logical rationale there is little room for dissent from the practical judgment that detailed State supervision over a business as a whole creates a closer degree of involvement in the enterprise's treatment of a segment of the public than if the State had stood aside. One who intrudes into a situation voluntarily cannot disclaim further responsibility with the same ease as a bystander. The volunteer who takes an injured person into his charge has a duty to use care even though he was free to play the Levite rather than the Good Samaritan. " * * * he is regarded as entering voluntarily into a relation of responsibility, and hence as assuming a duty." Prosser, *Torts*, p. 194 (1941). The owner of land may leave it to nature even though rocks careen into a village,¹⁸⁵ but he is liable for harm done by what is put there by himself or his predecessors in possession.¹⁸⁶ The master who appoints a servant cannot disclaim responsibility for acts causing harm closely related to what he authorized even though he forbade that particular conduct;¹⁸⁷ nor can a principal deny liability upon contracts made by his agent in violation of his instructions if they are within the general area in which the

¹⁸⁵ *Pontardawe, R.C. v. Moore-Gwyn*, 1 Ch. 656, 98 L.J. Ch. 424; See Prosser, *Torts* (1955) p. 430.

¹⁸⁶ *Restatement Torts*, § 364.

¹⁸⁷ See, e.g., *Hinson v. United States*, 257 F. 2d 178, 181, 183 (C.A. 5).

agent was authorized to contract.¹⁸⁸ Much the same notion underlies the doctrine that one who voluntarily assumes control over the conduct of another is liable to third persons for the harm the other does, even though there may be no element of reliance; as where the owner of a car fails to restrain the driver¹⁸⁹ or a hospital permits a charlatan to treat a patient on the premises.¹⁹⁰ And where one voluntarily assumes a relationship such as that of a carrier to its passenger, or a warden to his prisoner, or a department store to persons on the premises,¹⁹¹ there is a duty to use care to protect them from injuries by strangers. Here the State both undertook control over the conduct of public restaurants and also assumed the role of public protector.

A similar intuitive appraisal lies behind *Barton v. Wilmington Parking Authority*, *supra*. There the State's presence was felt in the ownership of the property, in the close relation, both physical and commercial, between its activities and the restaurant's business, and in the State's continuing relation as the landlord who selected the tenant. Here, the State's involvement is felt in its continuous supervision over the premises and virtually all aspects of the business, in the traditional legal duties of businesses affected with a public interest, in the influence which its offi-

¹⁸⁸ See, e.g., *Kidd v. Thomas A. Edison, Inc.*, 239 Fed. 405 (S.D.N.Y.) (L. Hand, J.).

¹⁸⁹ See *Grant v. Knepper*, 245 N.Y. 158, 160, 161, 156 N.E. 650 (Cardozo, J.); Mechem, *Outlines of the Law of Agency* (4th ed.) § 382.

¹⁹⁰ *Hendrickson v. Hodkin*, 276 N.Y. 252, 11 N.E. (2d) 899.

¹⁹¹ Prosser, *Torts* (1955) pp. 188-189, and cases cited.

cials can exert through their wide discretionary power both as licensing authority and through performance ratings. As in *Burton* the State flag over the building, though legally irrelevant, seemed to signify its involvement in the discrimination, so here the State "licenses" held by these places of public accommodation, while perhaps also legally irrelevant, still symbolize the State's substantial involvement in all aspects of their treatment of the public.¹⁹²

The degree of actual regulation of restaurants in Maryland¹⁹³ and South Carolina,¹⁹⁴ and of amusement

¹⁹² There are too many kinds of licenses to attribute constitutional significance to the possession of any license. Some licenses give the holders a special privilege to conduct for the benefit of the public a business in a field not open to unrestricted entry. In such cases the grant of one license excludes other applicants, and the possession of a State license by one who follows a practice of invidious discrimination against part of the public in effect shuts off the victims from facilities that would otherwise be available. In such a case, the State is responsible under the Fourteenth Amendment. See, e.g., *Steele v. Louisville & N.R. Co.*, 323 U.S. 192; *Roman v. Birmingham Transit Co.*, 280 F. 2d 531, 535 (C.A. 5). In most cases, however, the license is only a technique of examination, taxation or regulation. It carries no duty to serve any member of the public. The State's responsibility for the licensee's conduct is surely no greater than if the business were taxed, inspected or regulated without the issuance of a license. *Williams v. Howard Johnson's Restaurant*, 268 F. 2d 845, 847 (C.A. 4); *Wood v. Hogan*, 215 F. Supp. 53, 58 (W.D. Va.); *McKibbin v. Michigan C. & S.C.*, 369 Mich. 69, 119 N.W. 2d 557, 566; *Madden v. Queens County Jockey Club*, 296 N.Y. 249, 72 N.E. 2d 697, certification denied, 332 U.S. 761.

¹⁹³ Md. Code (1957), Art. 56, §§ 178-179; Art. 43, §§ 200, 202, 203, 209; Baltimore City Code (1950), Art. 12, §§ 24 and 107.

¹⁹⁴ S.C. Code (1962), §§ 35-51 through 35-54, 35-130 through 35-136, 35-142; Ordinances of the City of Columbia, §§ 12-27 through 12-33; § 2-73.

parks in Maryland,¹⁹⁵ is much less than in Florida. The State's association with their practices is proportionately diluted but not, we think, to the point where it ceases to be relevant. South Carolina, like Florida, enacted and later repealed a law requiring public establishments serving food to refrain from racial discrimination.¹⁹⁶ Maryland recently enacted such a statute.¹⁹⁷ Both the Maryland and South Carolina restaurants and the Maryland amusement park are in the special category of enterprises that issue a general invitation to the public, and are therefore affected with a public interest.

4. *These cases involve no substantial element of private choice*

Where racial discrimination becomes operative through a combination of private and governmental action, the elements of private choice and State involvement tend to be opposite sides of the same coin; as the latter increase in importance the former tend to recede. It is useful, nonetheless, to sift the facts and weigh the circumstances from the private point of view.

The salient feature is still that the proprietor of the place of public accommodation, like a carrier, has thrown his premises open to the public at large and invited its members, without personal selection, to be his business guests. Few enterprises, if any, issue a

¹⁹⁵ Md. Code (1957), Art. 25, § 14, Art. 27, § 506; Montgomery County Code (1960), §§ 15-7, 15-8, 15-11; Chapter 75.

¹⁹⁶ See notes 84, 90, *supra*.

¹⁹⁷ Maryland Laws (1963), Chs. 227, 228 (adding §§ 11 through 15 to Article 49B of the Code).

similar invitation. Even the largest corporations do not hold themselves out as offering employment to the public at large, nor do they forego all elements of personal selection. Doctors, lawyers, architects and accountants limit their clientele by one standard or another. Private schools and colleges reserve the right to pick and choose. The proprietor of a place of public accommodation however, as well as a public conveyance, expects to take and is expected to take all orderly persons, subject to rare restrictions pertaining to such matters as attire.¹⁹⁸ The character of his decor, advertising and service, as well as his prices, may influence the character of his patrons. Publishers and writers may frequent one restaurant and "the fight crowd" another; but if a table is available, even a philistine will be served among litterateurs.

The invitation is general and individual choice is excluded because the relationship between proprietor and customer in a place of public accommodation is entirely casual and evanescent. The inevitable consequence is that lunch counters, restaurants, theatres, amusement parks and like enterprises exercise the technical legal right to select their customers only to the extent of enforcing an impersonal racial ban, excluding or segregating Negroes. Furthermore, although there are areas in which some places of public accommodation serve all members without discrimination while others enforce segregation, the instant cases come from communities in which segregation has been an almost community-wide custom. The individual proprietor exercises little personal choice.

¹⁹⁸ See pp. 28-36 above.

It is also plain that the custom of excluding or segregating Negroes in places where whites are served is not really even a choice concerning the races with whom one will do business, or whom one will license to enter his property. The insubstantiality of the legal concepts of private property and choice of customers in this context is vividly demonstrated by the practice of three of the stores in which petitioners were arrested. It appears that Shell's City, the establishment involved in *Robinson v. Florida*, No. 60, is a large store whose Vice President and General Manager testified that "Shell's City does not have the official opinion that it is detrimental to their business for Negroes to purchase products in other parts of their store;" that "Negroes are permitted in the premises;" and that "they are permitted to do business with Shell's City" (R. 24). In *Bowie v. City of Columbia*, No. 10, the petitioners were arrested in Eckerd's Drug Store. The manager testified that the store was open to Negroes and that Negroes were "welcome to do business with Eckerd's" (R. 24). The facts in the *Barr* case are even more striking. It too involved a drug store that advertised itself as being a complete department store. The co-owner and manager testified that he invited Negroes into the store just like all other members of the public; that they traded in large numbers; and that they were even invited into the back area where food was served, provided that they took "an order to go" instead of eating food among whites (R. 19). These and other cases which previously have come before the Court show that the proprietors solicit the patronage of

Negroes, invite them onto the property and into the store, make sales in other departments—some even furnish food to eat away from the counter—but then they deny the Negro the privilege of breaking bread with other men. Manifestly, it is the stigma—the brand of inferiority that is important—not presence on the premises or reluctance to enter into a business relation. The legal concepts are merely a tool for enforcing obeisance.

The real particulars behind abstract nouns become crucial when striking the balance between “liberty” and “equality” inherent in determining whether there is enough State involvement to carry State responsibility under the Fourteenth Amendment.¹⁹⁹ See Mr. Justice Harlan concurring and dissenting in *Peterson v. Greenville*, 373 U.S. 244, 248, 250. The equality is freedom from caste. The liberty is freedom of personal choice, but for the most part only in the sense of a choice to act or refrain from acting in concert with others in maintaining the fabric of a caste system.

No doubt there are some instances in which the proprietor would decide to exclude Negroes upon truly individual grounds even though there were no system of segregation and the customary practice were to serve all members of the public. Obviously the opportunities for this kind of arbitrary choice are

¹⁹⁹ In his concurring and dissenting opinion in *Peterson v. Greenville*, 373 U.S. 244, 250, Mr. Justice Harlan said—

“Underlying the cases involving an alleged denial of equal protection by ostensibly private action is a clash of competing constitutional claims of a high order: liberty and equality.”

reduced by treating State recognition of a privilege to evict Negroes as a denial of equal protection of the law on the ground that the racial discrimination occurs in the public life of the community and is a cornerstone in a State-supported caste system. At least until the consequences of the State's prior involvement died out, the proprietor who has an idiosyncratic prejudice against Negroes remote from the caste system would be denied State support along with others whose preferences were affected by the caste system. If it were possible to isolate the community practice, and the community practice had no significant influence on the individual's decision, the special cases, perhaps, should be the subject of a special rule.²⁰⁰ Since the effort would be fruitless, the extraordinary case must yield to the general rule, as was held in *Peterson* and *Lombard* when the Court rejected Justice Harlan's view.

There is no significant unfairness in this conclusion. When the proprietor of a place of public accommodation discriminates against Negroes in a community which practices segregation, he knows that he is joining in the enforcement of a caste system. He takes the system as he finds it, infused with State sponsorship and support. That his motives may be different, his individual action innocent, is not controlling. When they become part of a community pattern so infused with prior State action as to

²⁰⁰ Such is not the case here. In addition to the managements' disavowal of antipathy to Negroes, there is considerable indication that the policy was adopted in conformity to community practice. See p. 28, *supra*.

render further State sanctions a denial of equal protection of the law, the unique proprietor's acts take on the color of the community practice and suffer the common disability resulting from the community wrong. "[T]hey are bound together as the parts of a single plan. The plan may make the parts unlawful." *Swift & Co. v. United States*, 196 U.S. 375, 396; *Terry v. Adams*, 345 U.S. 461, 470, 476 (Mr. Justice Frankfurter concurring). The risk that some proprietors may lose State protection for an arbitrary choice not influenced by the State's previous conduct is not great enough to permit the continuance of support for the tainted system. When an employer has dominated and supported a labor organization, the organization will be forever disestablished even though the employer's misconduct has ceased, even though some employees may freely prefer it, and even though a majority of the employees might vote to have it represent them. *Texas & N.O. R. Co. v. Brotherhood of Railway & S.S. Clerks*, 281 U.S. 548; *National Labor Relations Board v. Southern Bell Co.*, 319 U.S. 50. When the overwhelming tendency is clear, but no exact solution can be tailored because of the impracticability of a detailed psychological inquiry into the current effect of past events and community attitudes upon each individual mind, the necessity of dealing with the situation in the large justifies a remedy going somewhat beyond the exact consequences of the wrongdoing.

These problems, moreover, lie in an area where there is little appeal to the plea of private right. The proprietors of places of public accommodation open

their property and business to public use as part of the normal public life of the community. Segregation in such places is like segregation in a park or on the street: it is akin to a restraint against circulating as freely as other members of the public. Indeed, it is not without significance that the opening of a business affected with a public interest at common law was likened by Chief Justice Waite, quoting Lord Chief Justice Hale, to a man's setting out a street upon his own land. *Munn v. Illinois*, 94 U.S. 113, 150. While the dedication alone cannot supply affirmative elements of State involvement, it is relevant in weighing the significance of those elements of State involvement that are present against the possible interference with private right, for the purpose of determining whether those elements are sufficient to implicate the State in violation of the Fourteenth Amendment. "The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it." *Marsh v. Alabama*, 326 U.S. 501, 506. Petitioners have a constitutional right to be free from the consequences of all significant State encouragement or support for discrimination in places of public accommodation, whether the encouragement be past or present. When that right conflicts with the proprietor's claim of private right in a place of public accommodation, *Marsh v. Alabama* teaches that the former should prevail.

When one goes behind the abstract nouns it becomes apparent, therefore, that any balance to be

struck here between "liberty" and "equality" is no different from the balance struck by the framers of the Fourteenth Amendment and by this Court in earlier cases. Freedom from association with Negroes in places of public accommodation—the only freedom actually asserted—is indistinguishable from freedom from such association in government buildings,²⁰¹ in the court house,²⁰² or, indeed, on the streets and in public squares.²⁰³ In performing civil duties, such as serving on a grand or petit jury,²⁰⁴ or in attending public schools,²⁰⁵ the equality asserted is the same—freedom from the stigma of inferiority. We are not asking the Court to strike a novel balance.

C. THE IMPOSITION OF STATE RESPONSIBILITY WOULD GIVE EFFECT TO THE HISTORIC PURPOSES OF THE THIRTEENTH, FOURTEENTH AND FIFTEENTH AMENDMENTS

The central fact of these cases is that the States seek immunity to support the continuance of a caste system in the public life of the community that it was the central purpose of the Thirteenth, Fourteenth and Fifteenth Amendments to destroy. The three Amendments cannot be severed from their history or from each other in dealing with the tragic consequences of Negro slavery. Other forms of invidious discrimination, even by reason of race, creed or nationality, have a different significance in the community and therefore may have a different constitutional status. The

²⁰¹ *Derrington v. Plummer*, 240 F. 2d 922 (C.A. 5).

²⁰² *Johnson v. Virginia*, 373 U.S. 61.

²⁰³ See pp. 122-123, 136-137, *infra*.

²⁰⁴ *Strauder v. West Virginia*, 100 U.S. 303.

²⁰⁵ *Brown v. Board of Education*, 349 U.S. 294.

controlling philosophy of interpretation was stated in the *Slaughter-House Cases*, 16 Wall. 36, 67, 71-72:

The most cursory glance at these articles [of amendment] discloses a unity of purpose, when taken in conjunction with the history of the times, which cannot fail to have an important bearing on any question of doubt concerning their true meaning. * * *

* * * no one can fail to be impressed with the one pervading purpose found in them all, lying at the foundation of each, and without which none of them would have been even suggested; we mean the freedom of slave race, the security and firm establishment of that freedom, and the protection of the newly-made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over him. * * *

We do not say, that no one else but the negro can share in this protection. * * * But what we do say, and what we wish to be understood is, that in any fair and just construction of any section or phrase of these amendments, it is necessary to look to the purpose which we have said was the pervading spirit of them all, the evil which they were designed to remedy, and the process of continued addition to the Constitution, until that purpose was supposed to be accomplished, as far as constitutional law can accomplish it.

The unity is also pertinent in reading the Congressional debates. The Thirteenth Amendment, its implementing legislation (the abortive first supplementary Freedmen's Bureau Bill which failed of enact-

ment after it had been vetoed by President Johnson;²⁰⁶ the second supplementary Freedmen's Bureau Bill, varying in minor respects from the first, which was enacted into law and extended the life, and enlarged the powers, of the Freedmen's Bureau;²⁰⁷ and the Civil Rights Act of 1866 which originated as a companion measure to the first supplementary Freedmen's Bureau Bill),²⁰⁸ the Fourteenth and Fifteenth Amendments, the Ku Klux Act of 1871,²⁰⁹ and the Civil Rights Act of 1875²¹⁰ were all parts of a continuing legislative process. Many of the same Senators and Congressmen had the leading roles throughout the debates. Oftentimes, what they said and did in connection with one proposal helps to show their understanding of another.²¹¹

²⁰⁶ S. 60, 39th Cong., 1st Sess., Cong. Globe, p. 943.

²⁰⁷ 14 Stat. 173.

²⁰⁸ 14 Stat. 27.

²⁰⁹ 17 Stat. 13.

²¹⁰ 18 Stat. 335.

²¹¹ In view of the pressure of time, we do not attempt to summarize the Congressional history of the Thirteenth, Fourteenth and Fifteenth Amendments. The most pertinent studies are: Supplemental Brief for the United States on Reargument and the Appendix thereto in *Brown v. Board of Education*, Nos. 1, 2, 4, 8, and 10, October Term, 1953; Kendrick, *Journal of the Joint Committee on Reconstruction* (1914); James, *The Framing of the Fourteenth Amendment* (1956); Flack, *The Adoption of the Fourteenth Amendment* (1908); ten-Broek, *The Antislavery Origins of the Fourteenth Amendment* (1951); Harris, *The Quest for Equality* (1960); Collins, *The Fourteenth Amendment and the States* (1912); Frank and Munro, *The Original Understanding of "Equal Protection of the Laws,"* 50 Col. L. Rev. 131 (1950); Bickel, *The Original Understanding and the Segregation Decision*, 69 Harv. L. Rev. 1 (1955); Graham, *Our "Declaratory" Fourteenth Amendment*, 7 Stan. L. Rev. 3 (1954); Warsoff, *Equality and the Law* (1938); Randall, *The Civil War and Reconstruction* (1937); Nye, *Fettered Freedom* (1949).

The thrust of the movement was to make Negroes free and equal members of the community sharing the public rights and privileges and enjoying the opportunities of other men. During slave-holding days Negroes were not only held in bondage as if chattels; even when free they were subjected throughout the country to the elaborate disabilities of a caste system. See pp. 42-45 above. After the Civil War, Southern States promptly enacted "Black Codes" imposing disabilities so harsh as to make the emancipated Negroes "slaves of society," even though no longer the chattels of individual masters.²¹² See pp. 45-48 above. Those disabilities, both the old and the new, were the central target of a movement whose ideal was to apply to all men the Declaration that "all men are created equal."

The legislation began in the Thirty-Ninth Congress.²¹³ One group, apparently a majority, found authority to remove the disabilities by federal legislation under Section 2 of the Thirteenth Amendment. *E.g.*, Cong. Globe, 39th Cong., 1st Sess., 322, 474-476 (remarks of Senator Trumbull), 503 (remarks of Senator Howard), 1124, 1159. Representative Ward had articulated that view while the Thirteenth Amend-

²¹² Cong. Globe, 39th Cong., 1st Sess., p. 39.

²¹³ The 39th Congress considered (1) a bill introduced by Senator Wilson of Massachusetts (S. 9, 39th Cong., 1st Sess.) to maintain the freedom of the inhabitants in the rebelling States; (2) the first supplementary Freedmen's Bureau Bill (S. 60), which originated, in part, from the Wilson bill; and (3) S. 61, the bill which became the Civil Rights Act of 1866 (14 Stat. 27). It also enacted (after the submission of the Fourteenth Amendment to the States), the second supplementary Freedmen's Bureau Bill (14 Stat. 173).

ment was under consideration (Cong. Globe, 38th Cong., 2d Sess., p. 177):

... we are now called upon to sanction a joint resolution to amend the Constitution so that all persons shall be equal under the law without regard to color, and so that no person shall hereafter be held in bondage.²¹⁴

Another group doubted the sufficiency of existing constitutional authority and sought a new amendment. *E.g.*, Cong. Globe, 39th Cong., 1st Sess., pp. 500, 1120, 1268, 1290-1293. Among the latter was Representative Bingham, later the principal author of section 1 of the Fourteenth Amendment. *Id.*, at 1290-1293. But for both groups the overall purpose was clear; it was to remove the disabilities, old and new, North and South, that belied the equality announced in the Declaration of Independence.

To secure that ideal the proponents sought to guarantee equal "civil rights." The exact contours of the term went undefined. "Civil rights" were contrasted with "social rights," for which the proponents disclaimed concern (*id.*, 1117, 1159), and "political rights," which at first they were reluctant to espouse (*id.*, 476, 599, 606, 1117, 1151, 1154, 1159, 1162, 1263), although the more liberal view prevailed in the Fifteenth Amendment. Quite possibly "civil rights," in

²¹⁴ See also *id.* at 154; Cong. Globe, 38th Cong., 1st Sess., p. 2989. Senator Yates expounded this view in the debates on the Fourteenth Amendment. He asserted that the Thirteenth Amendment "did not confer freedom upon the slave, or upon anybody, without conferring upon him the muniments of freedom, the rights, franchises, privileges that appertain to an American citizen or to freedom, in the proper acceptation of that term." Cong. Globe, 39th Cong., 1st Sess., p. 3037.

this context, meant rights in areas conventionally ruled by law (*id.*, 476-477, 1117, 1122, 1291), which would include the relationships between members of the public and businesses affected with a public interest. Whatever the difficulty of exact definition, there is no doubt of the purpose to obliterate both the vestiges of slavery and also the caste system. "All men are created equal" excludes the idea of race, color, or caste," Senator Morrill of Maine declared. (*Id.*, 570-571.) Representative Hubbard of Connecticut similarly asserted that the words "caste, race, color" were unknown to the Constitution. He viewed the various proposals to protect the civil rights of freedmen as evidence that the nation was "fast becoming what it was intended to be by the fathers—the home of liberty and an asylum for the oppressed of all the races and nations of men." (*Id.* at 630.)²¹⁵ To Mr. Donnelly of Minnesota, it was "as plain * * * as the sun at noonday, that we must make all citizens of the country equal before the law; that we must break down all walls of caste; that we must offer equal opportunities to all men." (*Id.* at 589.) Senator Wilson declared, "The whole philosophy of our action is * * * that we cannot degrade any portion of our population, or put a stain upon them, without leaving heartburnings and difficulties that will endanger the

²¹⁵ Mr. Garfield of Ohio spoke in a similar vein, declaring that "The spirit of our Government demands that there shall be no rigid, horizontal strata running across our political society, through which some classes of citizens may never pass up to the surface; but it shall be rather like the ocean where every drop can seek the surface and glisten in the sun" (*id.*, App. p. 67). See also *id.* at 111.

future of our country. * * * [T]he country demands * * * the elevation of a race." (*Id.* at 341.) Senator Trumbull, who was not one of the so-called Radicals, described the purpose as to "secure to all persons within the United States practical freedom" and "privileges which are essential to freemen" (*id.* at 474-475).

The Civil Rights Act of 1866 was passed over President Johnson's veto, although its most sweeping terms were narrowed.²¹⁶ The Act links the Thirteenth and Fourteenth Amendments, for the Fourteenth Amendment put an end to the debate over the powers of Congress under the Thirteenth. Sections 1 and 5 of

²¹⁶ Section 1 of the Civil Rights Act of 1866, 14 Stat. 27, provided:

"That all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States; and such citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding." (Emphasis added.)

The original bill contained, in lieu of the italicized material above, the following clause:

"That there shall be no discrimination in civil rights or immunities among the inhabitants of any State or Territory of the United States on account of race, color or previous condition of slavery."

The circumstances and significance of the change are discussed at p. 139 *infra*.

the Fourteenth Amendment, according to one group in Congress, would put the principles of the Civil Rights Act of 1866 into the Constitution beyond the reach of a new Congress. See Cong. Globe, 39th Cong., 1st Sess., pp. 2459, 2462, 2465, 2467, 2538; see, also, *Monroe v. Pape*, 365 U.S. 167, 171; Harris, *The Quest for Equality* (1960), p. 40. Others thought that it would provide the Act with a surer constitutional foundation. *Id.* at 2461, 2511, 2961; Flack, *The Adoption of the Fourteenth Amendment* (1908), p. 94. It is not unnatural, therefore, that the aim to abolish the inequalities associated with caste found expression in the debates on the Fourteenth Amendment. Senator Howard of Michigan, in reporting the resolution to the Senate on behalf of the Joint Committee on Reconstruction, announced that it "abolishes all class legislation in the States and does away with the injustice of subjecting one caste of persons to a code not applicable to another" (Cong. Globe, 39th Cong., 1st Sess., p. 2766). Senator Doolittle wished "to put an end forever not only to slavery but to the aristocracy that was founded upon it * * *." (*Id.* at 2897.)²¹⁷

The broad generalizations must be read in the light of history and applied to current institutions with an

For many similar references, see, *id.* at 2493, 2503, 2530, 2531, 2459, 2510, 2539, 2961, 3034. In the debates on the Stevens "apportionment" amendment, which was a precursor of the present section 2 of the Fourteenth Amendment, Senator Sumner indicated that, in his view, Congress had decreed, in the Civil Rights Act of 1866, "that colored persons shall enjoy the same civil rights as white persons; in other words, that, with regard to civil rights, there shall be no Oligarchy, Aristocracy, Caste, or Monopoly, but that all should be equal before the law without distinction of color" (*id.* at 684).

understanding of their underlying significance. The declarations of equality were aimed at well-known disabilities, associated with caste, that barred Negroes from being equal members of the public. In 1865 a Negro who was barred from a train or other public conveyance, or from an inn or like place of public accommodation, was subjected to a special disability because of his race. In 1960, these petitioners were subjected to an identical stigma because of their race. In each case the discrimination was solely a mark of caste.

We do not overlook either the force of the direct opposition or the doubts of the moderates, both of which helped to shape the Fourteenth Amendment. See pp. 137-143 below. It will be helpful, however, first to note the evidence bearing upon the specific problem of equality in places of public accommodation. The evidence convincingly shows, despite the paucity of direct references, that unequal access to public places, including inns, hotels, public conveyances, and places of public amusement, fell in the general category of disabilities with which the framers were concerned.

1. The framers were undoubtedly concerned about freedom of movement in the broadest sense. In the Thirty-Ninth Congress, while denouncing the Black Codes as "inconsistent with the idea that these freedmen have rights," Senator Wilson asserted that the freedmen were as free as he was "to work when they please, to play when they please, *to go where they please* * * *" (*id.* at 41) (emphasis added). The Black Codes should be annulled so that

[T]he man made free by the Constitution of the United States, sanctioned by the voice of the American people, is a freeman indeed; *that he can go where he pleases, work when and for whom he pleases; that he can sue and be sued; that he can lease and buy and sell and own property, real and personal; that he can go into the schools and educate himself and his children; that the rights and guarantees of the good old common law are his, and that he walks the earth, proud and erect in the conscious dignity of a free man* * * *. [*Id.* at 111; emphasis added.]²¹⁸

Senator Sherman of Ohio, who objected to the Wilson bill because it did not specify what rights were to be protected, favored an attempt at a more precise definition. "For instance," he explained, Congress could agree that every man should have the right, *inter alia*, "to go and come at pleasure * * *" (*id.* at 42). That was "among the natural rights of free men" (*ibid.*). Senator Trumbull thought it was "idle to say that a man is free who cannot go and come at pleasure, who cannot buy and sell, and who cannot enforce his rights" (*id.* at 43). Introducing the first supplementary Freedmen's Bureau Bill, Trumbull pronounced it to be the duty of Congress to declare null and void all laws which would not permit the Negro, *inter alia*, "to buy and sell, and to go where he

²¹⁸ Wilson's bill would have rendered null and void all State laws, statutes, acts, ordinances, rules and regulations "whereby or wherein any inequality of civil rights and immunities * * * is recognized, authorized, established or maintained," by reason of color, race, or previous condition of servitude (Globe, 39th Cong., 1st Sess., p. 39).

pleases" (*id.* at 322).²¹⁹ Again in the debates upon S. 61, the bill which became the Civil Rights Act of 1866, Senator Trumbull, who introduced it, mentioned "the right to go and come at pleasure" as one of the fundamental rights secured by the bill. *Id.* at 477.²²⁰

²¹⁹ Sections 7 and 8 of the first supplementary Freedman's Bureau Bill applied only to those States in which the ordinary course of judicial proceedings had been interrupted by the rebellion. Under section 7 the President was given the duty to extend military protection and jurisdiction over all cases where any of the civil rights or immunities of white persons were denied to anyone in consequence of local law, custom or prejudice, on account of race, color, or previous condition of servitude; or where different punishment or penalties were inflicted on Negroes than were prescribed for white persons committing like offenses. The rights specifically enumerated in the section were the right to make and enforce contracts; to sue; be parties, and give evidence; to inherit, purchase, lease, sell, hold, and convey real and personal property; and "to have full and equal benefit of all laws and proceedings for the security of person and estate * * *." The eighth section made it a misdemeanor for any person "under color of any State or local law, ordinance, police, or other regulation or custom," to deprive anyone on account of race or color or previous condition of servitude "of any civil right secured to white persons * * *." (Cong. Globe, 39th Cong., 1st Sess., p. 318.)

²²⁰ As originally introduced, the Civil Rights Bill (S. 61) contained a provision stating that "there shall be no discrimination in civil rights or immunities among the inhabitants of any State or Territory of the United States on account of race, color, or previous condition of slavery or involuntary servitude * * *." (Cong. Globe, 39th Cong., 1st Sess., p. 474.) This provision was in the bill when Trumbull uttered the words quoted in the text. The provision was deleted before enactment, *id.* at 1366, but plainly the Act invalidated any racial restrictions upon freedom of movement. See p. 117 n. 216 *supra*.

Some of the Black Codes barred Negroes from towns or other specified areas, and forbade their movement at certain hours,²²¹ but the purpose of securing the "right to come and go at pleasure" must have been to remove barriers to freedom of movement in the public life of the community.²²² Even in 1866 equal opportunities to use trains and public conveyances, and to stop at inns and hotels were essential to civil equality. The soda fountain, the lunch counter and the roadside restaurant were unknown, but today the premises of those places of public accommodation

²²¹ An ordinance of the City of Opelousas, Louisiana, referred to in the Report of General Schurz on conditions in the South (Senate Executive Document No. 2, 39th Cong., 1st Sess., pp. 92-93) and in the Congressional debates (Cong. Globe, 39th Cong., 1st Sess., pp. 516-517), provided, *inter alia*, that "no negro or freedman shall be allowed to come within the limits of the town of Opelousas without special permission from his employers, specifying the object of his visit and the time necessary for the accomplishment of the same"; that "every negro or freedman who shall be found on the streets of Opelousas after ten o'clock at night without a written pass or permit from his employers shall be imprisoned and * * * pay a fine"; that "[n]o negro or freedman shall reside within the limits of the town * * *" if not "in the regular service of some white person or former owner * * *"; nor, with narrow exceptions, engage in public meetings or congregations within the town limits without permission of the mayor or the president of the Board of Police; nor "sell, barter, or exchange any articles of merchandise or traffic within the limits of Opelousas without permission in writing from his employer or the mayor or president of the board * * *."

²²² A witness before the Joint Committee on Reconstruction testified that the people of Virginia were "reluctant even to consider and treat the negro as a free man, to let him have his half of the sidewalk or the street crossing." House Report No. 30, 39th Cong., 1st Sess., Testimony, Part II, p. 4.

serve a function little different from the public square a century earlier. See pp. 136-137 below.

2. Both the civil rights legislation and the Fourteenth Amendment sought to guarantee equality before the law. Members of the public not suffering from racial disability had long had a legal right to use public conveyances and to enter and obtain service in inns, hotels and, quite possibly, places of public entertainment and amusement. Removal of the racial disability, therefore, would extend that same legal right to enter and be served, to Negroes. The logic is so inescapable that we may feel sure that any member of Congress would have answered affirmatively if he had been asked in 1868 whether the Civil Rights Act of 1866 and the Fourteenth Amendment would have the effect of securing Negroes the same right as other members of the public to use hotels, trains and public conveyances.²²³

The Congressional debates between 1864 and 1874 reflect an awareness of the right conferred by the common law to nondiscriminatory service in many places of public accommodation, such as inns, hotels,

²²³ There is also some indication that the courts followed this reasoning. In *Ferguson v. Gies*, 82 Mich. 358, 365 (1890), where a Negro had sued for damages arising from the refusal of a restaurant owner to serve him at a table reserved for whites, the Michigan Supreme Court held that a Michigan statute enacted in 1885, prohibiting the denial of "full and equal" privileges of inns, restaurants, eating houses, barber shops, public conveyances and theatres to any citizen, was only declaratory of the common law; that prior to the time when Negroes were made citizens of the State unjust discrimination in such public places would have given a white man a claim for damages; and that the Negro had gained a similar right on becoming a citizen.

and common carriers.²²⁴ The subject was discussed at some length in connection with bills to ban discrimination and segregation on trains and street cars in the District of Columbia.²²⁵ Some thought that theatres and places of public amusement generally were also subject to the common law rule.²²⁶ While perhaps they were wrong, such institutions, as was well known, were regulated, and in a sense created, by the law and therefore subject to special responsibilities. See the debates on the Civil Rights Act of 1875, discussed pp. 130-135 below.

3. The proponents of the abortive Freedmen's Bureau Bill and the Civil Rights Act of 1866 never denied the frequent charge that those measures would grant Negroes the right to equal treatment in places of public accommodation. The apparent reason is that they regarded the "charge" true; as we have explained, it was the inevitable consequence of making Negroes equal with other members of the public before the law even in the narrowest sense of the words.

²²⁴ See the remarks of Senator Sumner (Cong. Globe, 42nd Cong., 2d Sess., p. 381-383); remarks of Senator Harlan of Iowa (38th Cong., 1st Sess., p. 839); remarks of Senator Pratt of Indiana (2 Cong. Rec. 4081-4082).

²²⁵ Note especially the argument of Reverdy Johnson, a conservative Senator and notable constitutional lawyer. (Cong. Globe, 38th Cong., 1st Sess., p. 1156-1157.) For a general discussion of this legislation and the attitude of the post-Civil War Congresses towards discrimination in public conveyances and places of public accommodation, see Frank and Munro, *The Original Understanding of "Equal Protection of the Laws,"* 50 Col. L. Rev. 131.

²²⁶ 2 Cong. Rec. 4081.

During the debate in the House on the first supplementary Freedmen's Bureau Bill, Representative Rousseau, of Kentucky, who opposed the bill, suggested that the grant of equal "civil rights and immunities" gave Negroes the same privileges in theatres and railway cars. With respect to the latter, he expressly defied the proponents of the bill to "combat that position." (Cong. Globe, 39th Cong., 1st Sess., App. 70). Although he was frequently interrupted, his construction of the bill was not disputed. (*Id.* at App. 68-71.) Representative Dawson, of Pennsylvania, observed that the bill constituted only a part of a broad policy to enforce equality for Negroes so that they should be " * * * admitted to the same tables at hotels [and] to occupy the same seats in railroad cars." (*Id.* at 541.)

After the Freedmen's Bureau Bill passed the House, it was vetoed by the President, in part because it failed to define the "civil rights and immunities" which are thus to be secured to the freedman by military law. " * * * " (*Id.* at 916.) Senator Davis of Kentucky, speaking in support of the veto, protested that "commingling with [white persons] in hotels, theaters, steamboats, and other civil rights and privileges, were always forbid to free negroes," until recently granted by Massachusetts. (*Id.* at 936.) Although Senator Trumbull delivered a long speech in opposition to the veto, he did not question Senator Davis's assertion that such rights were secured by the bill. (*Id.* at 936-943.) Indeed, Senator Trumbull remarked that he should "rejoice" when the Southern States "shall abolish all civil distinctions between

their inhabitants on account of race or color; and when that is done one great object of the Freedmen's Bureau will have been accomplished." (*Id.* at 943.)

The first Freedmen's Bureau Bill failed to become law, although, on July 16, 1866, it was re-enacted with minor changes over a second presidential veto. 14 Stat. 173. After the first veto was upheld, the Civil Rights Bill was taken up, debated at length, passed by both Houses and then vetoed. (*Id.* at 1679.) In the course of the debate on the veto, Senator Davis objected to the bill, declaring, as he had declared with respect to the Freedmen's Bureau Bill, that it obliterated discrimination between the races with respect to the facilities of steamboats, railway cars, and hotels.²²⁷ The veto was overridden, without debate in the House.

²²⁷ Sen. Davis said (*id.* at Appendix 183):

"[T]his measure proscribes all discriminations against negroes, in favor of white persons that may be made anywhere in the United States by any 'ordinance, regulation, or custom,' as well as by 'law or statute.'"

"But there are civil rights, immunities, and privileges 'which ordinances, regulations, and customs' confer upon white persons everywhere in the United States, and withhold from negroes. On ships and steamboats the most comfortable and handsomely furnished cabins and state-rooms, the first tables, and other privileges; in public hotels the most luxuriously appointed parlors, chambers, and saloons, the most sumptuous tables, and baths; in churches not only the most softly cushioned pews, but the most eligible sections of the edifices; on railroads, national, local, and street, not only seats, but whole cars, are assigned to white persons to the exclusion of negroes and mulattoes. All these discriminations * * * are established by ordinances, regulations, and customs. This bill proposes to break down and sweep them all away, and to consummate their destruction * * *"

4. The general public understanding of the Civil Rights Act of 1866, which was the direct precursor of the Fourteenth Amendment (see pp. 117-118 above), seems to have been that it would open to Negroes public conveyances and places of public accommodation and amusement. The best survey is Flack, *The Adoption of the Fourteenth Amendment* (1908), pp. 11-54. Flack concludes (p. 45)—

There also seems to have been a general impression among the press that negroes would, by the provisions of the bill, be admitted, on the same terms and conditions as the white people, to schools, theaters, hotels, churches, railway cars, steamboats, etc.

He also cites (pp. 46-47) accounts of numerous incidents showing a similar widespread belief among members of the public.

5. The understanding is further reflected in the equal public accommodations laws enacted during the Reconstruction Period. Many of the Southern States passed such laws between 1868 and 1873. Thus, as early as April, 1868, the people of Louisiana ratified a new constitution expressly providing that:

All persons shall enjoy equal rights and privileges, upon any conveyance of a public character; and all places of business, or of public resort, or for which a license is required by either State, parish, or municipal authority, shall be deemed places of a public character, and shall be opened to the accommodation and patronage of all persons, without distinction or discrimination on account of race or color. * * *

And the constitutional ²²⁸ mandate was carried out by implementing legislation in 1869, ²²⁹ in 1870, ²³⁰ and again in 1873. ²³¹ South Carolina followed with a similar enactment in 1869. ²³² In the ensuing years, equal public accommodation laws were passed in Georgia (1870), ²³³ Arkansas (1873), ²³⁴ Mississippi (1873), ²³⁵ and Florida (1873). ²³⁶

There can be no doubt that these measures were enacted in response to the Fourteenth Amendment. To be sure, they were the product of "reconstructed" legislatures, in which Negroes, for the first time, participated. In some cases, perhaps, they were dictated by federal authorities. At the least, they reflect a contemporary view that freedom from discrimination in public places of accommodation was part of the promise of equal protection. This was the view of the military authorities administering the Reconstruction program, ²³⁷ presumably in accordance with the will of

²²⁸ La. Const. 1868, Art. 13.

²²⁹ La. Acts 1869, p. 37. See *Hall v. De Cuir*, 95 U.S. 485.

²³⁰ La. Acts 1870, p. 57.

²³¹ La. Acts 1873, p. 156. In addition, the Louisiana legislature asked to adopt Sumner's supplementary civil rights bill (*infra*, p. 132), pending in 1872. La. Acts, 1872, p. 29.

²³² 14 S.C. Stat. 179. See, also, the statute of 1870 reprinted in 2 Fleming, *op. cit.*, pp. 285-288.

²³³ Ga. Laws 1870, pp. 398, 427-428.

²³⁴ Ark. Laws 1873, pp. 15-19.

²³⁵ Miss. Laws 1873, p. 66.

²³⁶ Fla. Laws 1873, p. 25, ch. 1947.

²³⁷ See, e.g., G. O. No. 32, 2d Military District (applicable to North Carolina and South Carolina), in 1 Fleming, *op. cit.*, pp. 435, 437.

"8. In public conveyances on railroads, highways, streets, or navigable waters no discrimination because of color or caste shall be made, and the common rights of all citizens thereon shall be recognized and protected. * * *

Congress. It was a view that apparently gained some general acceptance in the South.²³⁸ The most perceptive exposition was made by Justice Horatio Simrall for the Supreme Court of Mississippi, in 1873, in *Donnell v. State*, 48 Miss. 661. A Kentuckian by birth, Justice Simrall was a law professor, plantation owner and a Mississippi State Legislator before the Civil War. He served for nine years on Mississippi's highest court, the last three as Chief Justice, and later lectured at the University of Mississippi which granted him an honorary doctorate.²³⁹ In upholding the equal public accommodation law of Mississippi, Justice Simrall, after noting that "The 13th, 14th and 15th amendments of the constitution of the United States, are the logical results of the late civil war, now more distinctly seen than immediately succeeding its termination" (*id.* at 675), pointed out that "The fundamental idea and principle pervading these amendments, is an impartial equality of rights and privileges, civil and political * * *" (*id.* at 677), and he then sustained the Mississippi equal public accom-

²³⁸ We have already noticed that these equal accommodation laws were not immediately repealed when Reconstruction ended. See note 90, *supra*. Nor were they mere dead-letter, at least for a time. See, e.g., *Donnell v. State*, 48 Miss. 661; *Sauvinet v. Walker*, 27 La. Ann. 14, affirmed, 92 U.S. 90; *Joseph v. Bidwell*, 28 La. Ann. 382. It is also worth noting that some responsible Southerners were arguing for freedom from racial discrimination in places of public accommodation. See, e.g., Cable, "The Freedman's Case in Equity" (1884) and "The Silent South" (1885), in Cable, *The Negro Question* (Turner ed., 1958), pp. 56-82, 85-131.

²³⁹ V *National Cyclopedia of American Biography* (1907), p. 456. See also, XXXVIII *id.*, pp. 225-226; Rowland, *Courts, Judges and Lawyers of Mississippi 1798-1935* (1935), pp. 98-99.

modations law as applied to a theatre which sought to segregate a Negro patron.²⁴⁰ Cf. *Coger v. The North West. Union Packet Co.*, 37 Iowa 145 (1873) (refusal of a steamship company to serve Negro in main cabin violated both State constitution and the Fourteenth Amendment).

Nor were those in the "occupied" States of the Confederacy alone in this understanding of the Fourteenth Amendment. Other States, subject to no federal intervention, were responding in similar vein to the command of the Amendment. Massachusetts had already enacted an equal accommodation law in 1865.²⁴¹ New York did so in 1873,²⁴² Kansas in 1874,²⁴³ and fifteen other States were to follow their lead before the turn of the century.²⁴⁴

6. Granting that the membership of both Houses of Congress had undergone some changes and that opinions expressed after the event must be read with caution, the presence of Senators and Representatives who had been prominent on the Committee of Fifteen on Reconstruction and in the consideration of the Fourteenth Amendment gives both the debate upon, and the enactment of, the Civil Rights Act

²⁴⁰ The argument of the Attorney General of Mississippi is even more explicit in relating the public accommodations law to the Thirteenth and Fourteenth Amendments; he argued that without such a statute there would be a plausible pretext for interference by the federal government to enforce by appropriate legislation the equal protection of the laws. 48 Miss. at 664-673.

²⁴¹ Mass. Acts 1865, p. 650.

²⁴² N.Y. Laws 1873, p. 303.

²⁴³ Kan. Laws 1874, p. 82.

²⁴⁴ See n. 19, *supra*.

of 1875 significance as an exposition of the original understanding. Both confirm the view that the Fourteenth Amendment was expected to bring equality in places of public accommodation and amusement, and to authorize Congress to enact appropriate legislation when a State denied this form of equal protection of the laws.

The Civil Rights Act of 1875 originated with a bill introduced by Senator Sumner on December 20, 1871, to amend the Civil Rights Act of 1866. The bill in its original form provided that all persons, without distinction of race or color, should be entitled to "equal and impartial" enjoyment of any accommodation, advantage, facility, or privilege furnished by inns, public conveyances, theaters, or other places of public amusement, public schools, churches and cemeteries.^{244a}

In explaining his bill, Sumner declared:

The new made citizen is called to travel for business, for health, or for pleasure, but here his trials begin. The doors of the public hotel, which from the earliest days of our jurisprudence have always opened hospitably to the stranger, close against him, and the public conveyances, which the common law declares equally free to all alike, have no such freedom for him. He longs, perhaps, for respite and relaxation at some place of public amusement, duly licensed by law, and here also the same adverse discrimination is made.²⁴⁵

^{244a} Cong. Globe, 42d Cong., 2d Sess., p. 244.

²⁴⁵ Cong. Globe, 42d Cong., 2d Sess., p. 381.

After quoting Holingshed, Story, Kent and Parsons on the common law duties of innkeepers and common carriers to treat all alike, Sumner continued:

As the inn cannot close its doors, or the public conveyance refuse a seat to any paying traveler, decent in condition, so it must be with the theatre and other places of public amusement. Here are institutions whose peculiar object is the "pursuit of happiness," which has been placed among the equal rights of all.²⁴⁶

Sumner's bill, which had been adversely reported in 1870 and 1871, was introduced on December 20, 1871, and attached as an amendment to the Amnesty Bill. The Amnesty Bill, as amended, failed to secure the requisite two-thirds vote, but there were thirty-three affirmative to nineteen negative votes, which seemingly indicates that a great majority thought that the amendment was constitutional. Among the majority were fifteen Senators who had participated in the consideration of the Fourteenth Amendment.²⁴⁷

Senator Sumner's bill was not considered in the House at that Congress. A resolution was offered declaring that it would be contrary to the Constitution

²⁴⁶ *Id.* at 382-383. See also 2 Cong. Rec. 11 ("Our colored fellow-citizens must be admitted to complete equality before the law. In other words, everywhere, in everything regulated by law, they must be equal with all their fellow-citizens. There is the simple principle on which this bill stands.") [Emphasis added.] See, also, Cong. Globe, 42d Cong., 2d Sess., p. 381 ("The precise rule is Equality before the Law; * * * that is, that condition before the Law in which all are alike—being entitled without any discrimination to the equal enjoyment of all institutions, privileges, advantages and conveniences created or regulated by law * * *") [Emphasis added.]

²⁴⁷ Flack, *The Adoption of the Fourteenth Amendment* (1908), 259-260.

for Congress to force mixed schools upon States or to pass any law interfering with churches, public carriers, or innkeepers, such subjects of legislation belonging exclusively to the States. The resolution was defeated by a vote of eighty-four to sixty-one. Among those voting against the resolution—and thus to sustain the power of Congress—were Representatives Bingham, Dawes, Garfield, Hoar and Poland, all active in Congress' submission of the Fourteenth Amendment to the States.²⁴⁸

In the Forty-third Congress Representatives Butler of Massachusetts, Chairman of the House Judiciary Committee, reported a bill which was in all material respects the same as Sumner's bill, and which ultimately (after the provisions with respect to schools, churches, and cemeteries were eliminated in committee) was enacted as the Civil Rights Act of March 1, 1875. Butler, like Sumner, declared that the purpose of the bill was to secure equality in public establishments licensed by law:²⁴⁹

The bill gives to no man any rights which he has not by law now, unless some hostile State statute has been enacted against him. He has no right by this bill except what every member on this floor and every man in this District has and every man in New England has, and every man in England has by the common law and the civil law of the country. Let us examine it for a moment. Every man has a right to

²⁴⁸ Cong. Globe, 42d Cong., 2d Sess., 1582.

²⁴⁹ 2 Cong. Rec., 43d Cong., 1st Sess., 340. See, also, 3 Cong. Rec., 43d Cong., 2d Sess., 1005, 1006.

go into a public inn. Every man has a right to go into *any place of public amusement or entertainment for which a license by legal authority is required.* [Emphasis added.]

During the same session, Senator Sumner again presented his bill. It was reported to the Senate on April 29, 1874, by Senator Frelinghuysen, who argued that Congress had power to pass the bill under its power to implement the equal protection clause:²⁵⁰

Inns, places of amusement, and public conveyances are established and maintained by private enterprise and capital, but bear that intimate relation to the public, appealing to and depending upon its patronage for support, that the law has for many centuries measurably regulated them, leaving at the same time a wide discretion as to their administration in their proprietors. This body of law and this discretion are not disturbed by this bill, except when the one or the other discriminates on account of race, color, or previous servitude.

In addition to Senator Frelinghuysen, Senators Morton,²⁵¹ Edmunds,²⁵² and Boutwell,²⁵³ who had been a member of the Reconstruction Committee, all ex-

²⁵⁰ 2 Cong. Rec., 43d Cong., 1st Sess., 3452.

²⁵¹ Senator Morton said (*id.* at Appendix 361):

"* * * the very highest franchise that belongs to any citizen of the United States as such is the right to go into any State and there to have the equal enjoyment of every public institution, whether it be the court, whether it be the school, or whether it be the public conveyance, or whether it be any other public institution, for pleasure, business, or enjoyment, created or regulated by law."

²⁵² *Id.* at 4171.

²⁵³ *Id.* at 4116.

pressed the opinion that the rights enumerated in the Sumner Bill were secured by the Fourteenth Amendment. The Sumner Bill passed the Senate on May 23, 1874, by a vote of 29 to 16.²⁵⁴ There were nine Senators supporting the bill who had taken part in the enactment of the Fourteenth Amendment. Only two Senators who voted for the Amendment were opposed.²⁵⁵

The House, however, took up the Butler bill, which was almost identical with the Sumner bill. It passed the House on February 4, 1875,²⁵⁶ the Senate on February 27, 1875,²⁵⁷ and became law on March 1, 1875.²⁵⁸

The Civil Rights Act of 1875 manifestly went beyond the power of Congress under the Fourteenth Amendment insofar as it attempted to create a direct federal right to equal service in places of public accommodation without a finding that a State had denied equal protection of its laws. *Civil Rights Cases*, 109 U.S. 3. Curiously, the bill's sponsors appear to have been proceeding upon the theory that the legislation was necessitated by the failure of some States to secure that equality (see p. 133 above), yet they failed to recite the justification in the bill and the Solicitor General did not urge it in his argument. The Court then assumed both that the right to nondiscriminatory treatment in places of public accommodation was secured by the Fourteenth Amend-

²⁵⁴ *Id.* at 4176.

²⁵⁵ Flack, *Adoption of the Fourteenth Amendment* (1908), 270, 271.

²⁵⁶ 3 Cong. Rec., 43d Cong., 2d Sess., 1011.

²⁵⁷ *Id.* at 1870.

²⁵⁸ *Id.* at 2013.

ment and, also, that the right was in fact protected by the States. The decision rests upon those assumptions. 109 U.S. at 19, 21, 24. See also pp. 73-77 above.

Taking together all the evidence under the foregoing heads, it is an inescapable inference that Congress, in recommending the Fourteenth Amendment, expected to remove the disabilities barring Negroes from the public conveyances and places of public accommodation with which they were familiar, and thus to assure Negroes an equal right to enjoy these aspects of the public life of the community. The disability, then, as now, was plainly of caste. Removing it was within the broad purposes of the Amendments.

While the thrust of history points towards the conclusion that the Amendments were intended to secure Negroes equal treatment in places of public accommodation, in two respects events outstripped the framers' foresight. First, a whole new class of establishments grew up, notably the lunch counters, soda fountains, restaurants and numerous places of amusement now so familiar in the public life of the community. Second, the law of many jurisdictions, instead of extending to these new public enterprises the traditional duty of those engaged in public callings, retrenched and gave no person a legal right to enjoy their facilities.²⁵⁰

The first development hardly affects the case. It is a constitution we are interpreting, and the framers

²⁵⁰ But see the remarks of Representative Lawrence upon the Civil Rights Act of 1866 for implied general recognition of a States' power to enlarge or contract the civil rights of all citizens. Cong. Globe, 39th Cong., 1st Sess., 1832.

of the Amendments appear to have been well aware that they were writing a constitution. See Bickel, *The Original Understanding and the Segregation Decision*, 69 Harv. L. Rev. 1, 59-64 (1955). Today's widely known places of public accommodation have some characteristics of the inn and common carrier, and some of the streets and public squares. Both were within the conception of the framers. If the proliferation of commercial establishments has made men less dependent than formerly upon the proprietor who pursues a public calling, the easier access to the premises and the increasingly casual nature of the contacts in the new places of public accommodation now make exclusion even more plainly a mark of caste. In the circumstances of our times eviction from a lunch counter, public restaurant or amusement park is scarcely different from the earlier inhibitions against coming and going upon the street or in the public square. Any personal contacts are more casual and evanescent than the relationships between travelers in the carriers and inns of the mid-nineteenth century.

The second development raises a serious difficulty. The expectation, as we have said, was that Negroes would be secured a right to equal treatment in places of public accommodation under State law by virtue of the constitutional compulsion to extend to them the same familiar legal right possessed by other members of the public. Withholding the legal right from everyone cut part of the ground from under the expectations and thus raises a question whether the dominant intent was to secure equality in places of

public accommodation as segments of public life closely regulated by law, or was to provide such equality only to the extent of applying the same legal doctrines to members of both races without regard to the resulting discrimination in fact.

The answer would be easier if the question did not involve one of the critical issues in the evolution of the Fourteenth Amendment. The dominant purpose of its sponsors was to eradicate the caste system. Dealing with constitutional rights, they must have been concerned with substance, not form; and plainly racial discrimination in places of public accommodation was a substantial mark of caste. Yet across the forward thrust of the dominant purpose cut two arguments which had considerable influence upon the Senators and Representatives who held the balance of power. One argument was that the civil rights bills asserted, and the proposed constitutional amendments would give Congress, excessive power to legislate directly concerning rights and duties which had been, and ought to be, the domain of the States (Cong. Globe, 39th Cong., 1st Sess., pp. 113, 363, 499, 598, 623, 628, 936, 1268, 1270-1271, 2940; App. p. 158). The other was that the radicals' excessive zeal was leading them to impose equality upon the whole community, not only in civil rights but also in social and political rights (*id.* at 343, 477, 541, 606, 1122, 1157). In this context there was criticism of the vagueness of the measures (*id.* at 41, 96, 342, 1157, 1270-1271) and possibly some tendency to exaggerate their scope (*id.* at 601-602; App. p. 70).

At one time the latter objection seems to have carried weight with the moderates and to have influenced Representative Bingham, who was the principal author of Section 1 of the Fourteenth Amendment.²⁶⁰ Before the Civil Rights Act of 1866 could be enacted, general language forbidding "discrimination in civil rights or immunities" was eliminated so that the Act conferred equality in respect of specific rights plus "full and equal benefit of all laws and proceedings for the security of person and property."²⁶¹

Whether this criticism also influenced the drafting of the Fourteenth Amendment seems questionable, but the effect of the argument against superseding State laws is plain. Representative Bingham's original equal rights amendment as reported by the Joint Committee on Reconstruction on February 26, 1866 read:

The Congress shall have power to make all laws which shall be necessary and proper to secure to the citizens of each State all privileges and immunities of citizens in the several States (Art. 4; sec. 2); and to all persons in the several States equal protection in the rights of life, liberty, and property (5th amendment).²⁶²

Had that language been adopted, Congress would have had unquestionable power to secure "equal protection

²⁶⁰ Bickel, *The Original Understanding and the Segregation Decision*, 69 Harv. L. Rev. 1, 22-24 (1955).

²⁶¹ See n. 216, *supra*.

²⁶² Journal of the Joint Committee on Reconstruction, S. Doc. No. 71, 63d Cong., 3d Sess., p. 17, hereafter cited as "Committee Journal."

in the rights of life, liberty and property," without regard to State law. Within the area of "the rights of life, liberty and property" there would have been no room for arguing a technical equality of no-right; substantial equality, as Congress judged it, would have become the test.

The Bingham equal rights amendment was abandoned in the face of overwhelming opposition to giving Congress direct power to legislate regardless of the States, but its core was carried forward into the first and fifth sections of the Fourteenth Amendment with important modifications:

Section 1. * * * No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

* * * * *

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

The revision makes it plain that Congress may legislate to secure equal protection only when there has been a denial of equal protection by a State.

It is more difficult to sense where the balance was struck upon the question of the scope of the promised equality. Professor Bickel, whose reading of the history is more restrained than that of many current commentators, concludes that "the new phrase, while it did not necessarily, and certainly not expressly, carry greater coverage than the old, was neverthe-

less roomier, more receptive to 'latitudinarian' construction" (Bickel, *op. cit.*, 61), but he also emphasizes the phrase "*of the laws*" (*id.* at 45). Quite possibly the upshot was that the framers, by granting exact equality in the formal rules of law and nothing more, sidestepped the problem of defining "civil rights" except as it might enter into the interpretation of the privileges and immunities clause.²⁶³ Certainly the proponents of the amendment emphasized the idea of equal laws. This was the explanation given by Thaddeus Stevens, who introduced the resolution in the House (Cong. Globe, 39th Cong., 1st Sess., p. 2459):

This amendment * * * allows Congress to correct the unjust legislation of the States, insofar that the law which operates upon one man shall operate *equally* upon all: Whatever law punishes a white man for a crime shall punish the black man precisely in the same way. * * * Whatever law protects the white man shall afford "equal" protection to the black man. Whatever means of redress is afforded to one shall be afforded to all. Whatever law allows the white man to testify in court shall allow the man of color to do the same.

Senator Howard, opening the debate in the Senate, explained that the equal protection clause (*id.* at 2765):

abolishes all class legislation in the States and does away with the injustice of subjecting one

²⁶³ A thorough historical investigation of the intent of the framers with respect to equality of treatment in places of public accommodation would have to go behind the *Slaughter-House Cases*, 16 Wall. 36, to consider whether this was not originally conceived to be one of the privileges and immunities of citizens.

caste of persons to a code not applicable to another. It prohibits the hanging of a black man for a crime for which the white man is not to be hanged. It protects the black man in his fundamental rights as a citizen with the same shield which it throws over the white man.

Yet the guarantee of equal protection suggests more than a guarantee of equal legal formulas. It was read later to mean equality "in everything regulated by law" and "the equal enjoyment of all institutions, privileges, advantages and conveniences created or regulated by law."²⁶⁴ At that time the area thus described was well defined; it was roughly coextensive with the public life of the community. Nor was some vagueness objectionable. The amendment was primarily intended to lay a foundation for future congressional action; then, as now, men were willing to resolve differences by leaving the final incidence of imprecise words to be unfolded by the future. There is ample evidence that the framers intended to give Congress power to act when the States failed to give equal protection in the actual administration of the laws,²⁶⁵ and so well informed a man as Justice Bradley believed at one time that the obligation involved a duty to enact protective legislation.²⁶⁶ Beyond doubt the scope of the guarantee was limited, but there is scant reason to suppose that it was limited to techni-

²⁶⁴ 2 Cong. Rec., 43d Cong., 1st Sess., p. 11; Cong. Globe, 42d Cong., 2d Sess., p. 381.

²⁶⁵ Cong. Globe, 39th Cong., 1st Sess., pp. 2465, 2542.

²⁶⁶ See p. 75, *supra*; see also Harris, *The Quest for Equality* (1960), p. 37.

cal inequalities in the laws themselves and did not extend to segments of public life that the laws customarily regulated. The narrower reading, as applied to today's places of public accommodation, poses the stark incongruity of a community-wide stigma of racial inferiority, in a State-regulated area of public life, flourishing in the face of the promise of the Amendments.

We pursue the inquiry no further. There is no need to determine in these cases whether a State's failure to grant Negroes a right to equal treatment in places of public accommodation involves a denial of equal protection of the laws, and, if so, whether Congress, in order to remedy a State's default, may provide the right by direct legislation. Wherever the purposive and limiting forces that shaped the Amendment reached equilibrium as applied to a situation in which the State has scrupulously refrained from acting, the consensus surely was not one of reluctance to provide for the invalidation of the slightest affirmative State interference on the side of caste. The very closeness of the balance with respect to the duty to provide equality in all public vehicles or places of public accommodation implies ready condemnation, at least in that area, of any product of unequal legislation.

Here respondents have never been truly neutral. The community-wide fabric of segregation is filled with threads of law and governmental policy woven by the State through a warp of custom laid down by historic prejudice. Discrimination in places of public accommodation is an indivisible part of that fabric.

It cannot be severed from the community-wide system of segregation and examined in isolation even in areas where State law never dealt with it directly. Past involvement in the larger scheme forbids a present posture of aloof indifference in places thrown open by the proprietor to the public life of the community. The States must at least take the trouble to notice what they have done and what is the effect of their current action. If the real consequence of a suit, whether civil or criminal, is to lend support to discrimination against the Negro in places of public accommodation—discrimination that the State has helped to encourage—then the State must stay its hand. Whether or not the State must act, it may not, under such circumstances, keep its finger on the scale in favor of the caste system.

That is the whole of our argument. That much, we submit, is compelled by the legitimate expectation of the framers of the Amendments in the light of contemporary realities. It is unimportant that the framers failed to foresee either the succession of events or the precise forms of State involvement. " * * * no human purpose possesses itself so completely in advance as to admit of final definition. Life overflows its moulds and the will outstrips its own universals. * * * It should be, and it may be, the function of the profession to manifest such purposes in their completeness if it can achieve the genuine loyalty which comes not from obedience, but from the according will, for interpretation is a mode of the will and understanding is a choice." L. Hand, *The Speech of Justice*, 29 Harv. L. Rev. 617, 620 (1916).

After a century it is not too much to say that the States must scrupulously avoid continuing to support, even indirectly, a stigma serving no function but to preserve public distinctions of caste which the Amendments promised to eliminate.

CONCLUSION

The judgments of conviction should be reversed.

Respectfully submitted.

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